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II.B. Procedural history

ACS quickly determined all allegations to be unfounded. During her initial meeting with CPS Ms. Tyler, Ms. Smith immediately presented her with documentation of Hannah's medical care, causing CPS Tyler to note "**she has taken Hannah to several people and has not had one referral**." *Id.* at 20 (emphasis in original). CPS Tyler also contacted Dr. Wilkerson, the pediatrician, who confirmed that Hannah was healthy, fully vaccinated, and meeting developmental milestones. *Id.* at 28. By June 3, five days into the investigation, CPS Tyler concluded that Ms. Smith and Mr. Green's protective capacity was "moderate to high as they have provided proof that they have explored evaluating Hannah, as well as safety proofed the home to ensure she is unable to hurt herself." Exhibit E at 34. CPS Tyler also assessed that there was no "immediate or impending danger of serious harm" and that no safety plan or other intervention was needed. Exhibit Z at 5.

Ultimately, CPS determined that both the inadequate guardianship and medical neglect allegations were unfounded, and closed the case on July 26, 2022 with no services required. Exhibit Z at 7. In closing the case, the assigned CPS noted that the evidence did not support the allegations because while "there are some behavioral concerns for [Hannah]," "prior to the agency's involvement the BM [biological mother] had sought help for the child." *Id.* at 9.

III. ARGUMENT

III.A. Expungement is allowed on clear and convincing evidence that either refutes the allegation of harm to the child, or demonstrates that parents exercised adequate care.

The Office of Children and Family Services (OCFS) must seal any report not supported by a fair preponderance of the evidence. N.Y. SOC. SERV. LAW § 422(5)(a) (McKinney 2023). Further, OCFS may expunge a report where "the subject of the report presents clear and convincing

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evidence that affirmatively refutes the allegation of abuse or maltreatment; provided however, that the absence of a fair preponderance of the evidence supporting the allegation of abuse or maltreatment shall not be the sole basis to expunge the report." N.Y. SOC. SERV. LAW § 422(5)(c) (McKinney 2023). The distinction between sealing and expungement follows the weight of the evidence: a preponderance of the evidence against the report is sufficient to seal, whereas clear and convincing evidence is necessary to expunge.

Expunging records that have been refuted by clear and convincing evidence is consistent with the purpose of the SCR. Although the SCR originally preserved only indicated reports, in 1996, the Social Services Law was amended to provide for sealing rather than expungement of certain unsubstantiated reports. Raymond Hernandez, *Law to Ease Disclosures on Child Abuse*, N.Y. TIMES, Feb. 13, 1996. As the Senate memo in support of the amendment explained, by sealing rather than expunging records, the SCR would allow caseworkers to look more closely at subsequent reports in cases where there was some evidence of abuse but not enough to indicate the report. The Senate memo identified two circumstances in which an unsubstantiated report might conceal abuse: where a parent gives a plausible explanation for a child's injury but "a pattern of serious repeated injury to the child becomes evident" over time, and "cases where there is evidence that a child has suffered abuse or maltreatment, but because of the multitude of potential abusers, it becomes very difficult to identify the abuser." Senate Mem in Support, Bill Jacket, L 1996, ch 12 at 6. "The principal purpose of these [amendments] was to help child protective workers detect and investigate a 'pattern of abuse' revealed by unfounded reports . . . since an unfounded report . . . does not always indicate that a child has not been abused." *Matter of Mary L. v. State of N.Y. Dept. of Social Servs.* 676 N.Y.S.2d 704, 705 (3d Dept. 1998)

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By contrast, the need for closer scrutiny based on a previous unsubstantiated report does not extend to parents who demonstrate affirmatively that they never abused or neglected their child. N.Y. SOC. SERV. LAW § 422(5)(c) (McKinney 2023). Therefore, expungement is justified on clear and convincing evidence that refutes any element of the alleged abuse or maltreatment. Under the Family Court Act ("FCA"), parents may affirmatively show they did not neglect their child in two ways. First, a parent may show that the child did not suffer serious harm or the risk thereof. For instance, expungement was justified where a daycare employee left a child on the playground for several minutes but the child was unharmed. *Anne FF. v. New York State Off. of Child. & Fam. Servs*., 924 N.Y.S.2d 645, 646-7 (3d Dept 2011); *see also Gerald HH. v. Carrion*, 14 N.Y.S.3d 185, 187-88 (3d Dept. 2015) (amending indicated neglect record to unfounded and expunging after father presented evidence that he did not pick his son up by the neck and child bore no marks or injuries). Even where a parent leaves marks or bruises on their child, expungement may be justified if the harm was not serious. *Maurizio XX. v. New York State Off. of Child. & Fam. Servs.*, 3 N.Y.S.3d 782, 784-85 (3d Dept. 2015) (amending to unfounded and expunging indicated report of inadequate guardianship and excessive corporal punishment for spanking son in a bath, causing a bruise).

Second, a parent may affirmatively refute a report by showing that they were not at fault for whatever harm their child suffered. For instance, expungement of an inadequate guardianship report was granted based on genetic evidence that a toddler's tibia fracture could have resulted from an accidental fall combined with an underlying genetic disorder. *Gwen Y. v. New York State Off. Of Child. & Fam. Servs.*, 19 N.Y.S.3d 105, 107-08 (3d Dept. 2015). In that case, while the child clearly experienced harm in the form of a broken leg, the mother's evidence demonstrated that such impairment was not "the result of petitioner's failure to provide appropriate supervision

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and guardianship." *Id.* at 1092. Similarly, expungement is appropriate where "insufficient evidence exists to support the conclusion that petitioner's actions fell below a minimum degree of care" in supervising their child, even though the child was injured. *See Matthew WW. V. Johnson*, 799 N.Y.S.2d 594, 596 (3d Dept. 2005) (amending to unfounded and expunging report of inadequate guardianship when father allowed 5-year-old daughter play unsupervised on a swing set in his neighbor's yard, although she fell off the swing and was injured); *Steven A. v. New York State Off. of Child. & Fam. Servs.*, 762 N.Y.S.2d 672, 673-74 (3d Dept. 2003) (amending to unfounded and expunging a record of inadequate guardianship where 12-year-old got ahold of his father's gun because father had exercised care after the incident by removing all ammunition from the house). Even where one child was "placed in immediate danger" during a domestic violence incident and another child "suffered emotional impairment," expungement of the mother's record was justified because "neither the danger nor the impairment were the consequence of [her] actions." *Elizabeth B. v. New York State Off. of Child. & Fam. Servs.*, 47 N.Y.S.3d 515, 519 (3d Dept. 2017).

Hence, expungement is justified when a parent shows by clear and convincing evidence that their child was never at risk of serious harm, or that they were not at fault for any such harm.

III.B. Ms. Smith's SCR record of medical neglect should be expunged because medical evidence clearly and convincingly shows that Hannah was never seriously harmed or at risk of such harm, and in fact consistently received thorough medical care based on expert assessments.

Clear and convincing evidence may refute a report of medical neglect record by showing either that the child's health was never at risk of serious harm, or that the parent provided adequate medical care. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023). Here, medical experts consistently assessed that Hannah's behavior was developmentally normal for a child of her age

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and circumstances. In addition, Ms. Smith went above and beyond the degree of care required by the statute by securing medical assessments for Hannah and implementing doctor's orders. Therefore, expungement is doubly justified and should be granted in this case.

III.B.1. Clear and convincing evidence from four medical experts refutes the allegation that Hannah's behavior in school ever amounted to serious harm or a risk thereof.

A parent is responsible for medical neglect if, despite being made aware of a serious medical condition, they fail to seek or accept medical care for their child, and that failure places the child in imminent danger of becoming impaired. *Matter of Faridah W.*, 579 N.Y.S.2d 377, 378 (1st Dept. 1992). Thus, as with any claim of neglect under the FCA, medical neglect requires a threshold showing that the child has been harmed or placed at risk of harm. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023). "This prerequisite to a finding of neglect ensures that the Family Court . . . will focus on serious harm or potential harm to the child." *Nicholson v. Scoppetta,* 820 N.E.2d 840, 845 (N.Y. 2004). Furthermore, while a child's behavior may provide evidence of serious medical harm, this mode of proof requires a particularly high showing under the Act: "'Impairment of emotional health' and 'impairment of mental or emotional condition' includes a state of *substantially diminished psychological or intellectual functioning* in relation to . . . acting out or misbehavior, including ungovernability or habitual truancy." N.Y. FAM. CT. ACT § 1012(h) (McKinney 2023) (emphasis added). Thus, the Act distinguishes plain misbehavior, which – even if it merits concern from parents – is common among children, from actionable behavioral concerns that indicate substantially diminished functioning and risk serious harm to a child.

In the present case, Hannah was never seriously harmed or at risk of harm within the meaning of the FCA. Rather, her behavior was always developmentally normally for a child of her

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age, without signs of diminished psychological functioning, much less a substantial diminution. Substantial psychological diminution means a substantial deviation from the norm of psychological development, such as a child experiencing hallucinations. *See Matter of Jaelin L.,* 5 N.Y.S.3d 246, 249 (2d Dept. 2015). Around the time that Berkeley raised concerns about Hannah's behavior, however, her pediatrician, a pediatric neurologist, and a psychoanalyst all assessed her as developmentally normal. Exhibit A at 19-20; Exhibit B; Exhibit L at 1. In addition to three doctors, a social worker from the DOE who observed Hannah at school and CPS Tyler, who observed her at school and home, both agreed that Hannah exhibited behaviors that were normal for a five-year-old and that she was "developmentally on target." Exhibit E at 22, 18.

Nor did medical experts evaluate Hannah to be at risk of a serious mental health condition; to the contrary, they thought her behaviors resulted from the difficult transition to a new school environment and would be temporary. Exhibit A at 18-19; Exhibit H at 9. Indeed, the only diagnosis Hannah received was an adjustment disorder relating to this transition. Exhibit B. While an adjustment disorder may be evidence of negative changes in a child's life, it is not alone a substantial psychological diminution. *See In re Isobella A.*, 25 N.Y.S.3d 465, 467 (4th Dept. 2016) (affirming finding of emotional neglect where child had adjustment disorder diagnosis but focusing on mother's effort to alienate child from her father and interfere with father's visitation). Here, unlike in *Isobella A.*, Hannah's adjustment disorder related to the transition to a new school, rather than other neglectful behavior by her parents. *See Id*. Further, although the first source also alleged that Hannah was making suicidal and homicidal statements, Berkeley staff had never previously mentioned such statements among the behaviors they reported to Hannah's parents or in the letter they prepared for her for diagnostic purposes, and these statements were never directly observed by CPS Tyler or the many experts who evaluated Hannah. Exhibit I; Exhibit E at 9.

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Instead, multiple medical experts concluded that Hannah that was continuing to develop normally. Exhibit A at 19 (Dr. Wilkerson describing Hannah's issues as "likely behavioral"); Exhibit B at 2 (Dr. Zhu describing Hannah was a "normally developed child"); Exhibit Z at 9 (CPS Tyler confirming that Hannah "was meeting her developmental milestones"). Thus, Hannah never experienced substantial diminution of psychological function.

Further, the case at hand is distinct from cases of substantial psychological diminution because Hannah did not need psychological treatment. One element of medical neglect is the refusal of medical care, meaning that a medical condition not requiring treatment cannot form the basis for neglect. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023). "The statute defining a 'neglected child' does not require a parent to beckon the assistance of a physician for every trifling affliction that a child may suffer, because everyday experience teaches that many of a child's ills may be overcome by simple household nursing." *Matter of Hofbauer,* 393 N.E.2d 1009, 1013 (N.Y. 1979). Therefore, a finding of medical neglect based on psychological needs of the child typically involves a parent's refusal of needed professional psychological assistance such as therapy or residential treatment. *See Matter of Junaro C.*, 536 N.Y.S.2d 109, 109-10 (2d Dept. 1988) (affirming finding of medical neglect after mother refused consent to have her son transferred to a residential psychiatric treatment, failed to provide any alternative that would give her son the highly structured environment he required, and failed to attend ordered therapy sessions); *In Re Alexander L.*, 2012 N.Y. Slip Op. 07062 (1st Dept. 2012) (affirming finding of medical neglect for child with fragile emotional state whose mother terminated three years of weekly therapy)*; Judah S. v. Gary R.*, 124 N.Y.S.3d 69, 71 (2d Dept. 2020) (affirming finding that father had medically neglected children by refusing therapy for them despite multiple referrals and

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being made aware several times of their worsening behavior). Thus, a medical assessment that no treatment was necessary refutes any claim of medical neglect.

Here, unlike children exhibiting substantial psychological diminution, Hannah's doctors never prescribed any psychological treatment or intervention. Rather, they recommended "simple household nursing" to address her behavioral problems, indicating that like the "trifling afflictions" discussed in *Hofbauer,* these problems were not severe enough to trigger the protections of the Act. *Hofbauer,* 393 N.E.2d at 1013. Dr. Zhu recommended that Hannah's parents and teachers use behavioral modification techniques, and counseled Mr. Green on the use of such techniques. Exhibit B at 2. Similarly, the occupational therapist recommended Hannah's parents and the school work together – without further expert assistance – to set rules for her behavior. Exhibit H at 10; Exhibit K at 21. Unlike medically neglected children whose parents denied them needed therapy or residential treatment, Hannah was never prescribed any professional psychological assistance. Exhibit Z at 5 (ACS caseworker concluding no services or interventions were required); *see, e.g., Matter of Junaro C.*, 536 N.Y.S.2d at 110 (upholding finding of medical neglect based on mother's refusal of needed residential treatment). Thus, Hannah's substantial record of medical clearances affirmatively refutes the allegation of medical neglect and even taken alone justifies expungement of Ms. Smith's record.

III.B.2. Ms. Smith's thorough and dedicated pursuit of appropriate medical care for Hannah also affirmatively refutes the report of medical neglect.

In addition to a showing of serious harm or risk thereof, to demonstrate medical neglect, the government must prove that a parent failed "to exercise a minimum degree of care . . . in supplying the child with adequate medical care." N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2023). Although parents have a duty to provide mental health care when made aware that such

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treatment is necessary to prevent their child's emotional or psychological impairment, *Judah S.*, 124 N.Y.S.3d at 71, the broad standard of "adequate medical care" affords great deference to a parent's choice of treatment. *See Matter of Felicia D.*, 693 N.Y.S.2d 41, 42-43 (1st Dept. 1999) (affirming dismissal of medical neglect petition based on mother's refusal of residential treatment for her child when she consented to an adequate alternative, outpatient care).

In providing adequate medical care, a parent may rely on the recommendations of any attending clinician. *Hofbauer,* 393 N.E.2d at 1014. To determine whether the parents have pursued adequate treatment, courts cannot "assume the role of a surrogate parent," but only ask "whether the parents . . . have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority." *Id.* While endorsing reliance on physicians, the Court of Appeals emphasized that in making care decisions, parents may rely on the "recommendations and competency" of a practitioner licensed by the State, for such a person is "recognized by the State as capable of exercising acceptable clinical judgement." *Id.* at 1014 (quoting *Doe v. Bolton,* 410 U.S. 179, 199 (1973)*, reh. den.* 410 U.S. 959 (1973)). In cases of alleged behavioral illness, this rationale clearly extends to those licensed by the State to treat behavioral health: here, occupational therapists, N.Y. EDUC. LAW § 7902 (McKinney 2023), and psychoanalysts, N.Y. EDUC. LAW § 8405 (McKinney 2023).

Nor does the law require the parent's chosen physician to conform with widely accepted medical advice. Only those decisions entirely "contrary to medical authority" are medically neglectful. *Matter of Shawndel M.*, 824 N.Y.S.2d 335, 336 (2d Dept. 2006) (upholding neglect finding where mother refused a recommended transfer to an intensive care unit for her diabetic daughter, and encouraged her daughter to pull out an IV and leave the hospital against all medical advice); *see also Hofbauer*, 393 N.E.2d at 1011 (dismissing petition where parents refused

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traditional chemotherapy, opting instead for a metabolic course of treatment "not widely embraced by the medical community"). Instead, a parent may refuse to consent to a physician's recommendations as long as she provides an alternative course of treatment. *Matter of Nabil H.A.*, 150 N.Y.S.3d 128, 130 (2d Dept. 2021) (finding a mother was not neglectful when she refused consent to a recommended stay at the hospital and administration of a psychiatric drug, instead allowing outpatient care). Because parents retain significant discretion to direct their child's treatment, a "mother's refusal to consent to the course of medical treatment proposed by mental health professionals" for her son experiencing hallucinations and a desire to self-harm "would not, by itself, have justified a finding of medical neglect." *Matter of Jaelin L.*, 5 N.Y.S.3d at 249 (affirming finding of medical neglect after respondent mother also denied seriousness of symptoms and refused to cooperate in forming alternative course of treatment); *see also Matter of Ariel P.*, 957 N.Y.S.2d 736, 738 (2d Dept. 2013) (reversing finding of medical neglect after mother refused medication and continued public hospitalization, but consented to discharge to private hospital).

In addition to the broad discretion allowed to a parent's medical decisions, the FCA mandates that courts pay an extra degree of deference to a parent's choice of care when the alleged harm to the child is psychological. Beyond the showing of fault always required under the Act – that a child's impairment is a result of their parent's failure to exercise a minimum degree of care – in psychological harm cases, the child's "impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child." N.Y. FAM. CT. ACT §§ 1012(f)(i), 1012(h) (McKinney 2023). As the Court of Appeals explained in *Nicholson,* "the Legislature recognized that the source of emotional or mental impairment – unlike physical injury – may be murky, and that it is unjust to fault a parent too readily." *Nicholson*, 820 N.E.2d at 846. Unlike the failure to exercise a minimum degree of care

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standard found elsewhere in the FCA, psychological harm demands a higher degree of culpability (inability or unwillingness) as well as a higher degree proof of causation. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2023); *see Matter of Linda E.*, 533 N.Y.S.2d 542, 544-5 (2d Dept. 1988) (reversing fact-finding order and dismissing petition of medical neglect where parents objected to continued hospitalization of their "disturbed child" and failed to bring her to weekly outpatient therapy because the state could not prove that the child's difficulties were caused by parent's reluctance to engage in treatment). Thus, to find psychological neglect, the government must show that a child's substantial psychological diminution is clearly attributable to their parent's inability or unwillingness to accept the care of any mental health professional.

In the present case, Ms. Smith went above and beyond a minimum degree of care by promptly acting on the school's request to seek psychological assessment for Hannah. Unlike the mother in *Jaelin L.*, 5 N.Y.S.3d at 249, who discounted the seriousness of her son's symptoms, Ms. Smith immediately acknowledged the seriousness of the behavioral problems the school described and demonstrated willingness to provide care. Exhibit H at 3 ("I agree that [Hannah] could use behavioral modification therapy. . . I really appreciate you folks flagging this . . . It is an issue that needs to be addressed"). Ms. Smith's decision to pursue medical assessments rather than an IEP, which could have affected Hannah's academic prospects, was well within the degree of care required by the FCA. Indeed, the family court gives great deference to parents like Ms. Smith who choose "one course of appropriate medical treatment over another." *Weber v. Stony Brook Hospital*, 467 N.Y.S.2d 685, 687 (2d Dept. 1983) (reversing finding of medical neglect and dismissing petition against parents of an infant born with serious deformities who refused a recommended operation that would reduce the chance of infection but likely leave the child without the use of her legs in the future). While deciding against an assessment for an IEP, Ms.

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Smith chose an alternative course of treatment by pursuing psychological assessments and an informal, provider-endorsed plan for behavioral modification. *Id* at 687; Exhibit H at 3.

Further, by promptly and thoroughly seeking appropriate medical care for Hannah, Ms. Smith continued to exceed the minimum degree of care required by the FCA. During the investigation, "CPS was provided documentation stating [Hannah] was seen and evaluated by several providers for her behavioral issues." Exhibit Z at 5; *see also* Exhibit E at 34 (concluding that Ms. Smith's pursuit of evaluations demonstrated moderate to high protective capacity). Within a month of the school's initial recommendation that Hannah be psychologically assessed, Ms. Smith had Hannah seen by her pediatrician, an occupational therapist, a pediatric neurologist, and a psychoanalyst. Exhibit A at 18-19; Exhibit B; Exhibit N; Exhibit L at 1. She and her husband secured all of these appointments on their own, and reached out to nearly 50 providers to do so. Exhibit E at 21 (noting "**[Ms. Smith] has taken Hannah to several people and has not had one referral**") (emphasis in original); Exhibit H at 4 (describing medical outreach to Berkeley staff); Exhibit K (logging contact with providers).

Ms. Smith also exercised care by advocating consistently for Berkeley to implement the recommendations for behavioral modification made by Dr. Zhu and Dr. Williams. Exhibit H at 9 (asking Berkeley staff to implement behavioral modification techniques); Exhibit G at 4-5 (requesting DOE assistance ensuring Hannah was treated properly at Berkeley). She implemented behavioral modification techniques herself at home, including speaking with Hannah about how to treat others. Exhibit H at 10; Exhibit F at 8. Ms. Smith's actions clearly fall within the wide range of parental discretion protected by *Hofbauer* because she not only "[relied] upon the recommendations and competency of the attending physician," but also complied fully with all medical recommendations to address Hannah's behavior. *Hofbauer,* 393 N.E.2d at 1014.

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Additionally, going above and beyond doctor's orders, Ms. Smith enrolled Hannah in therapy as soon as a provider became available. Exhibit P. Given this level of care, Hannah's continuing difficulty in school was not remotely attributable to Ms. Smith, much less "clearly attributable" as the FCA requires. N.Y. FAM. CT. ACT § 1012(h) (McKinney 2023).

Thus, clear and convincing evidence in the form of medical records, emails, and other communication demonstrates that Ms. Smith thoroughly pursued medical care for Hannah and consistently followed the recommendations of physicians. In addition to the fact that Hannah was never substantially psychologically impaired, Ms. Smith's more than adequate provision of medical care affirmatively refutes the allegation that Hannah was medically neglected and justifies expungement.

III.C. The report of inadequate guardianship should be expunged because even if true, Ms. Smith's alleged inability to control Hannah's behavior at school did not satisfy either the fault or harm elements of a neglect finding.

In addition to the allegation of medical neglect, the SCR contains an unsubstantiated report of inadequate guardianship against Ms. Smith. Exhibit Z at 9. A subcategory of child neglect under the FCA, inadequate guardianship entails a parent's failure to exercise a minimum degree of care in providing their child with proper supervision by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof "by any . . . acts of a similarly serious nature" to excessive corporal punishment or the misuse of drugs or alcohol. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2023). The types of harm named in the statute itself – corporal punishment and substance abuse – can also form the basis for inadequate guardianship. *See Rosengarten v. New York State Off. Of Child. & Fam. Servs.*, 162 N.Y.S.3d 376, 377 (1st Dept. 2022) (denying amendment of indicated case for inadequate supervision by excessive corporal

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punishment when father hit his son and threw a water bottle at his head); *Christine Y. v. Carrion*, 904 N.Y.S.2d 808, 810 (3d Dept. 2010) (denying amendment of indicated case for inadequate supervision by alcohol abuse when mother drove while impaired with children in the car, risking an accident). But the catch-all provision also "clearly contemplates that the instances of neglectful behavior mentioned therein are not an exclusive list." *Matter of Lonell J.*, 673 N.Y.S.2d 116, 117 (1st Dept. 1998). Just like any other type of neglect under the FCA, the catch-all of inadequate guardianship encompasses acts that fall below a minimum degree of care and expose a child to serious harm or the imminent risk of such harm. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2023); *Nicholson*, 820 N.E.2d at 846 ("the statutory test is '*minimum* degree of care' – not maximum, not best, not ideal – and the failure must be actual, not threatened").

A parent's decision to leave her child alone or with someone else only amounts to an act of a "similarly serious nature" as alcohol or drug abuse or corporal punishment when that decision exposes the child to a known risk of serious harm. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2023). For instance, leaving children with known abusers is neglectful. *Matter of John Z.*, 2006 N.Y. Slip Op. No. 15654–05, *7 (N.Y. Fam. Ct. Oct. 27 2006) (finding that entrusting children to abusive boyfriend and covering up his actions was inadequate guardianship); *Debra VV*, 798 N.Y.S.2d 264, 265-66 (3d Dept. 2005) (affirming denial of amendment of indicated record for inadequate guardianship when guardian entrusted a child to the care of their father in violation of a court order, resulting in the child's sexual abuse). Similarly, it was neglectful to leave children unsupervised in a non-childproofed room where one child had a serious disability. *Matter of Jarrett SS.*, 122 N.Y.S.3d 832, 836 (3d Dept. 2020).

Conversely, where there is not a known risk, the FCA does not automatically fault parents who fail to supervise their children, even when harm occurs as a result. "Leaving children

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unattended . . . does not amount to neglect in all cases." *Matter of Alachi I.*, 2023 N.Y. Slip Op. 01822, *4 (3d Dept. 2023). In that case, a mother's repeated failure to supervise three children, including twice leaving when her infant fell, was not neglectful because she was doing her best to watch them while attending to their needs, and requested assistance in caring for them. *Id.* Similarly, a father's decision to let his 5-year-old play alone on a swing set, where she was injured, was not inadequate guardianship under the Act because he took reasonable precautions by checking on her every 10-15 minutes and believed that her older sister was watching her. *Matthew WW.*, 799 N.Y.S.2d at 596. In another instance, leaving an unlocked gun in the home where a 12-year-old was able to get ahold of and fire it was not inadequate guardianship because, when he found out what had happened, respondent father immediately took precautions by removing all ammunition. *Steven A.*, 762 N.Y.S.2d at 674; *see also In re Janique Y.*, 682 N.Y.S.2d 706, 707-08 (3d Dept. 1998) (affirming dismissal of petition based on serious burns a child suffered after playing with a lighter mother left on the table while sleeping, after mother had previously spoken with children about the dangers of fire). Thus, a record of inadequate guardianship should be expunged where a parent can show that the decision to leave their child unsupervised or with someone else was not unduly risky.

In the present case, Ms. Smith's alleged inability to control Hannah's behavior at school, even if true, did not amount to inadequate guardianship. Sending Hannah to a city-run preschool did not entail a known risk of serious harm. Per the SCR record, "The case came in due to parents . . . *not being able to control the child's behavior*" [sic] (emphasis added). Exhibit Z at 5. Yet apart from the school setting, there was never any allegation that Ms. Smith could not control Hannah's behavior. Moreover, simply being unable to control a child's behavior does not amount to neglect. *See Alachi*, 2023 N.Y. Slip Op. at *4. Thus, the report of inadequate guardianship turns on the

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question of whether Ms. Smith exercised a minimum degree of care in entrusting her daughter's supervision to Berkeley. While Hannah's behavior at preschool might have resulted in harm, Ms. Smith's decision to send her to Berkeley was like the father's decision in *Matthew WW* to let his daughter play alone on the swings, in that both parents believed another responsible party was watching their child. *Matthew WW*., 799 N.Y.S.2d at 596. Unlike parents who entrusted children to known abusers, *see e.g. Debra VV* 798 N.Y.S.2d at 265-66, Ms. Smith reasonably assumed that Berkeley would be able to meet Hannah's needs. When Ms. Smith later determined that Berkeley was not able to do so, she withdrew her daughter from the school. Exhibit W at 8.

Thus, Ms. Smith's actions in supervising Hannah went well above a minimum degree of care. Moreover, as discussed above, Hannah did not suffer serious harm or the risk thereof. *See Matter of Hakeem S.*, 171 N.Y.S.3d 261, 264 (3d Dept. 2022), *appeal denied*, 39 N.Y.3d 904 (N.Y. 2022) (reversing finding of neglect against mother who lost consciousness drinking while her children were asleep and was brought to hospital, because children were not harmed). Therefore, the inadequacy of the allegations of inadequate guardianship, even if true, affirmatively refutes this report. For these reasons, both records should be expunged.

III.D. The Office of Children and Family Services should exercise its discretion to expunge Ms. Smith's record because the underlying reports were likely made in bad faith.

Expungement is particularly justified when, in addition to being refuted, a report was made in bad faith. Expungement, rather than sealing, of bad-faith reports is consistent with the purpose of the SCR because such reports – which may be misleading to future investigators and are not based in fact – do not serve the purpose of detecting patterns of abuse. *See* NY Senate Debate on 1996 Senate Bill S5959A, Feb. 5, 1996 at 939 (expressing concern about "unfounded reports being

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used as retaliatory mechanisms"); *id*. at 890. Indeed, false reporting in the second degree is an alternate ground for expungement, even when the parent cannot affirmatively show that their child was not neglected. N.Y. SOC. SERV. LAW § 422(5)(c)(i) (McKinney). No cases have been reported under this provision, however, suggesting under-enforcement of criminal false reporting statutes. Following the maxim of *noscitur a sociis*, which provides that "words used in a statute are construed in connection with . . . the words and phrases with which they are associated," this provision reveals that evidence of bad faith weighs in favor of expungement. *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 443 N.E.2d 940, 943 (N.Y. 1982).

Here, the circumstances strongly suggest that the only reason this case was opened was due to bad-faith reports made by Berkeley staff. Although the names of the sources were not shared with Ms. Smith, many indicia reveal that both sources were associated with Berkeley. Exhibit E at 2, 5-6, 7, 8, 32. CPS visited the school to speak with the first source, who also provided the school address to register that report, and the second source stated that she wished to remain anonymous because while Berkeley policy did not ban making reports, "this report [was] being made by her independently of the school." *Id.* at 2, 7, 32. Moreover, both sources provided information about Hannah that no one but Berkeley staff would have known. *Id.* at 5-6 (recommendations that Hannah receive psychological evaluation), 6 (Hannah's interactions with teachers), 8 (policy of removing Hannah from the classroom for discipline), 32 (Hannah withdrawn from Berkeley).

If both reports were made by Berkeley staff, as this record strongly suggests, then they were made in bad faith. Ms. Smith consistently notified Berkeley staff about Hannah's appointments as they were scheduled and kept. Exhibit F at 5 (secured occupational therapy referral and scheduled appointment with pediatric psychoanalyst); Exhibit L at 1 (update from appointment with pediatric psychoanalyst); Exhibit H at 5 (scheduled appointment with

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pediatrician), 9 (updates from appointments with pediatrician and pediatric neurologist), 10 (update from appointment with occupational therapist). Yet the first source reported that Hannah's parents had refused to have her evaluated, an assertion that Berkeley staff would have known was false. Exhibit E at 6. Indeed, in contradiction to the first source, the second source admitted that Ms. Smith had pursued recommended evaluations. *Id.* at 32. The escalation of hostility between Berkeley staff and Ms. Smith also lends credibility to the possibility of a bad faith report. *See* Exhibit L at 1 (Berkeley staff stating that trust had been lost). Moreover, just two weeks before the reports were made, Berkeley staff had threatened Ms. Smith that they would make such a report if she continued to question their treatment of Hannah. Exhibit G at 4. Taken together, this evidence shows that the sources who reported that Hannah was neglected made statements they knew were false, and did so as a result of conflict with Ms. Smith. Thus, the reports were made in bad faith, are more likely to mislead than inform future investigators, and should be expunged.

IV. CONCLUSION

Expungement of the record of Ms. Smith in the SCR is clearly justified. Not only does Ms. Smith show by clear and convincing evidence that she provided Hannah with more than adequate medical care; she also shows that she fought for her daughter's behavioral health needs to be met at school consistent with medical recommendations. Ms. Smith's extensive record of outreach and visits to doctors stands alone to affirmatively refute that she was ever neglectful of Hannah, much less that Hannah's behavioral difficulties at school could be "clearly attributable" to her mother. Moreover, through medical assessments by several doctors, Ms. Smith shows by clear and convincing evidence that Hannah's behavior at school never rose to the level of serious harm or imminent risk of such harm. Difficulty adjusting to a new school environment post-pandemic simply does not amount to substantial diminution of psychological functioning. Further, the record

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of inadequate guardianship should be expunged because Ms. Smith demonstrates by clear and convincing evidence that any misbehavior Hannah displayed at school cannot be attributed to Ms. Smith and did not raise a risk of serious harm to her child. Finally, these refuted reports against Ms. Smith were made in bad faith, and should be expunged.

Applicant Details

First Name	**Johan**
Last Name	**Gonzalez**
Citizenship Status	**U. S. Citizen**
Email Address	**Johan.h.gonzalez@gmail.com**
Address	**Address** Street **5135 S Drexel Ave, Apt 3A** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**8455050076**

Applicant Education

BA/BS From	**Northeastern University**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 3, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning**

Recommenders

Stone, Geof
gstone@uchicago.edu
Rappaport, John
jrappaport@uchicago.edu
773-834-7194
Hallett, Nicole
nhallett@uchicago.edu
773-702-9611

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Johan Gonzalez

5135 South Drexel Avenue, Apt 3A, Chicago, IL 60615 • 845-505-0076 • Johan.h.gonzalez @gmail.com

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street,
Norfolk, VA 23510

Dear Judge Walker,

I am a recent graduate of the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024–2025 term. In the meantime, I will be working for Ropes & Gray, LLP in the litigation practice of their Boston office. As an aspiring trial litigator, I am interested in clerking for the opportunity to learn about motion practice and advocacy in the district court. On a personal level, I am excited by the prospect of being mentored by someone who has traversed a career path that aligns closely with my aspirations.

As a first-generation immigrant with extensive litigation experience, I believe that my unique perspective and experiences would make me a valuable addition to your chambers. From a young age, I was responsible for helping my parents navigate the complexities of our administrative state, from working with USCIS to become citizens to working with the New York State Education Department to ensure that my sister with Down Syndrome received the services she required. These experiences subconsciously pushed me towards a career in law and public service, and my latter professional experiences at the U.S. Attorney's Office, the Massachusetts Attorney General's Office, and the U.S. Department of Justice further led me to seek a clerkship.

If selected, I will bring a tireless work ethic and passion for public service. While completing my undergraduate degree, I began working as an investigator for the Medicaid Fraud Division of the MA Attorney General's Office, where I continued to work through the first two quarters of law school. I conducted complex data analyses and legal research into state regulations; interviewed witnesses, victims, and targets; and synthesized my findings into legal memoranda. I handled approximately twenty cases at any given time, including several cases that resulted in indictments and two that went to trial. During my first six months of law school, I helped settle five cases for approximately seven million dollars.

I have consistently demonstrated throughout my career that I can work well under intense pressure and have strong research and writing skills that I continue to hone. As a summer associate at Ropes & Gray, I worked on various client and pro bono matters that required extensive research, drafting memoranda, providing translation services, and conducting interviews, all while participating in firm-wide events and the firm's softball league. During my third year, I effectively balanced the competing time-intensive demands of being a student attorney for the Immigrants' Rights Clinic and serving as a Comments Editor for the *University of Chicago Legal Forum*. As a 3L student attorney, I worked over 350 hours, drafted a claims memorandum on complicated issues related to 18 U.S.C. § 1983, drafted and filed a complaint, and submitted a humanitarian parole application.

My resume, transcript, and writing sample are enclosed. Letters from Professors Nicole Hallett, John Rappaport, and Geoffrey Stone will arrive separately. Should you require additional information, please do not hesitate to let me know. Thank you for your time and consideration.

Sincerely,
/s/ Johan Gonzalez
Johan Gonzalez

Johan Gonzalez

5135 South Drexel Avenue #3A, Chicago, IL 60615 • Cell: 845-505-0076 • Jhgonzalez@uchicago.edu

EDUCATION:

The University of Chicago Law School, Chicago, IL
Juris Doctor, June 2023

- *Journal: The University of Chicago Legal Forum,* Comment Editor
- *Activities:* Latinx Law Student Association; First Generation Professionals, 3L Representative; Antitrust Law Association, Treasurer, Events Coordinator
- *Honors:* Dean's Certificate of Recognition for Pro Bono Service

Northeastern University, Boston, MA
Bachelor of Science, *Magna Cum Laude,* in Criminal Justice and Political Science, English Minor, May 2018

- *Honors: Alpha Phi Sigma* Criminal Justice Honor Society, *Pi Sigma Alpha* Political Science Honor Society, *Alpha Kappa Sigma* Scholarship, Hetler R. McKenzie Scholarship, *Phi Theta Kappa* Honors Society Scholarship

EXPERIENCE:

Edwin F. Mandel Legal Aid Clinic, Immigrants' Rights Clinic, Chicago, IL
Student Attorney, September 2022 – May 2023

- Researched legal issues and drafted related memoranda on 18 U.S.C.§ 1983, fourth amendment violations and Illinois state torts
- Drafted and filed a complaint in the Northern District of Illinois
- Prepared humanitarian parole applications
- Conducted interviews with Spanish-speaking clients and provided translation services

Ropes & Gray, Boston, MA
Litigation Summer Associate May 2022 – August 2022
Litigation Associate October 2023

- Researched legal issues and drafted related memoranda and motions on a variety of topics, such as the SEC's approach to ESG funds, and crimes of moral turpitude
- Assisted in Spanish-speaking client interviews by translating interview outlines, interpreter services, and translating engagement letters
- Provided attorneys with a weekly update on bankruptcy matters across the world

United States Department of Justice, Washington, DC
Antitrust Division Legal Intern, June 2021 – August 2021

- Research legal issues and draft related memoranda on a variety of topics, including the extraterritorial application of wire fraud and conspiracy to defraud the United States
- Cooperate with attorneys and paralegals in conducting legal research and preparing for criminal trials
- Participate in witness interviews and in case strategy sessions

Massachusetts Attorney General's Office, Boston, MA
Medicaid Fraud Division Investigator, August 2018 – March 2021
Medicaid Fraud Division Assistant Investigator, January 2017 – July 2018

- Investigated allegations of fraud, drug diversion, and patient abuse and neglect within the state's Medicaid program by analyzing complex data to determine potential fraudulent patterns of billing and conducting victim interviews
- Produced opening and closing memoranda, administrative demand letters, and subpoenas
- Worked on two criminal trial teams, interviewing witnesses in preparation for trial and testified in front of a jury
- Co-led an investigation with OIG, USAO, and IRS that concluded with the indictment of three individuals on counts of health care fraud, tax evasion, identity fraud, and tax evasion

United States Attorney's Office, Boston, MA
Economic Crimes Unit Legal Support Intern, January 2016 – July 2016

- Cooperated with Assistant U.S. Attorneys and paralegals in conducting legal research and preparing for trial
- Assisted in document management and review, including discovery production and case closings
- Audited bank records for potential fraud such as Ponzi and Pyramid schemes

LANGUAGES/ COMMUNITY SERVICES

- Native Spanish Speaker
- Intermediate German
- Project Citizenship, *Volunteer*, 2022
- Boston Homeless Shelter, *Volunteer*, 2016 – 2018
- Bikes Not Bombs, *Volunteer*, 2016 – 2017

THE UNIVERSITY OF CHICAGO

Name: Johan H. Gonzalez
Student ID: 12276052

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
Confer Date: 06/03/2023
Degree GPA: 176.940
J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2020
Current Status: Completed Program
J.D. in Law

External Education

Northeastern University
Boston, Massachusetts
Bachelor of Science 2018

Beginning of Law School Record

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	173
LAWS	30211	Civil Procedure William Hubbard	4	4	173
LAWS	30611	Torts Daniel Hemel	4	4	179
LAWS	30711	Legal Research and Writing Elizabeth Anne Reese	1	1	176

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	177
LAWS	30411	Property Lee Fennell	4	4	174
LAWS	30511	Contracts Bridget Fahey	4	4	173
LAWS	30711	Legal Research and Writing Elizabeth Anne Reese	1	1	176

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Elizabeth Anne Reese	2	2	178
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	179
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	175

Summer 2021

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	42401	Securities Regulation M. Todd Henderson	3	3	177
LAWS	42801	Antitrust Law Randal Picker	3	3	173
LAWS	43282	Energy Law Joshua C. Macey	3	3	173
LAWS	53445	Advanced Criminal Law: Evolving Doctrines in White Collar Litigation Thomas Kirsch	3	3	179
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	43292	The Law of Police Richard Mcadams	3	3	177
LAWS	46101	Administrative Law David A Strauss	3	3	177
LAWS	53132	Human Trafficking and the link to Public Corruption Req Designation: Meets Writing Project Requirement Virginia Kendall	3	3	180
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

THE UNIVERSITY OF CHICAGO

Name: Johan H. Gonzalez
Student ID: 12276052

University of Chicago Law School

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Geoffrey Stone	3	3	177
LAWS	41601	Evidence Emily Buss	3	3	177
LAWS	53404	The Role and Practice of the State Attorney General Michael Scodro Lisa Madigan	3	3	180
LAWS	94120	The University of Chicago Legal Forum	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Honors/Awards
Completed Pro Bono Service Initiative

End of University of Chicago Law School

Summer 2022

Honors/Awards
The University of Chicago Legal Forum, Comment Editor 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	43200	Immigration Law Amber Hallett	3	3	177
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	177
LAWS	81009	Intensive Trial Practice Workshop Herschella Conyers Erica Zunkel Judith Miller Craig Futterman Jorge Alonso	3	3	177
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	179

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Geoffrey Stone	3	3	179
LAWS	41101	Federal Courts Alison LaCroix	3	3	179
LAWS	53264	Advanced Legal Research Scott Vanderlin	2	2	177
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	179

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	43253	Regulation of Banks and Financial Institutions Adriana Robertson	3	3	177
LAWS	81123	Negotiation Jesse Ruiz	3	3	181
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	179

Date Issued: 06/10/2023


THE UNIVERSITY OF
CHICAGO

Professor Geoffrey R. Stone
Edward H. Levi Distinguished Service
Professor of Law
The University of Chicago Law School
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Chicago, IL 60637
g-stone@uchicago.edu | 773-702-4907

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in support of Johan Gonzalez's application to serve as your law clerk beginning next year. Johan is a 2023 graduate of The University of Chicago Law School.
Before entering law school, Johan graduated from Northestern University Magna Cum Laude, where he focused on criminal justice and political science. He then worked for three years in the Office of the Massachusetts Attorney General focusing on Medicaid Fraud.

While in law school at The University of Chicago, Johan served as Comment Editor of The University of Chicago Legal Forum, as an active member of the Latinex Law Student Association, as treasurer of the Antitrust Law Association, and as an active member of the Immigration Rights Clinic.

Johan has a particularly interesting and moving background. He was born in Columbia and emigrated to the United States when he was four years old. His parents are both Columbians who came from incredibly poor families. In the 1990s, Cali, where he grew up, was one of the most dangerous cities in South America, and after his father and several other family members had been shot, his parents decided enough was enough and they moved to America. Once arriving here, both of his parents worked from 50 to 80 hours per week in order to make ends meet and to help provide for their parents who were still in Columbia. His mother is a factory worker and his father is a long-haul trucker. That he made it to where he is today is truly amazing.

Johann graduated from law school with grades placing him just over the middle of his class. Ordinarily, I wouldn't recommend a student with such grades, but given his personal background his performance seems pretty impressive. Moreover, during the first half of law school, Johan's father was placed in an immigration detention center, a situation that put special family responsibilities on Johan, thus limiting the extent he could focus on his courses.

Johan was a student in my course on Constitutional Law III (Equal Protection and Due Process). In class, Johan was an active participant and although I knew nothing about his personal background at that time, he struck me as very impressive. His grade in my course put him in roughly the top 15% of the class.

My personal interactions with Johan were always lively, warm and interesting. All things considered, and especially in light of his background, I think he would be an excellent law clerk.

If you have any questions, please feel free to call on me anytime.

With best wishes.

Sincerely yours,
Geoffrey R. Stone

John Rappaport
Professor of Law
University of Chicago Law School
1111 East 60th Street | Chicago, Illinois 60637
phone 773-834-7194 | fax 773-702-0730
e-mail : jrappaport@uchicago.edu
www.law.uchicago.edu/faculty/rappaport

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Johan Gonzalez is not a typical clerkship applicant. He has had, in my estimation, something of an extraordinary life, surmounting significant adversity to become the first in his family to attend college and then graduate school. This adversity has, in some respects, created a drag on certain traditional markers of academic achievement, as I will discuss. But in other respects, Johan's accomplishments have been remarkable. Johan would come to you not only with a University of Chicago legal education and experience on the University of Chicago Legal Forum, but also four years of work experience at the Massachusetts Attorney General's Office. The proposition of hiring Johan is not entirely without risk, but my guess is that it would be immensely rewarding for both parties. I recommend you give him a serious look.

Johan was assigned to my section of 1L Criminal Law in the Winter Quarter of 2021. It was a good group, I remember, and Johan held his own in every respect. His cold calls were solid, and he struck me as smart and likable in social settings. The 177 he earned on the exam—which puts him right at the class's median—seemed about right, maybe a tad low compared to my expectations. When I had him again the following quarter in Criminal Procedure, he began to stand out a little more. He seemed to be finding his stride. He was clearly interested in the material and asked good questions to try to get things right. His exam was stronger, too, earning a 179—a high B+ on Chicago's unforgiving curve. That spring, Johan was invited to join the University of Chicago Legal Forum (on which he now serves as a Comments Editor).

Only when I began advising Johan about clerkships did I come to learn that his performance in my classes had been a high point of his 1L year. To be frank, I was surprised that his grades weren't significantly better than his transcript showed. As I started to talk with him more, it was like peeling back the layers of an onion. Johan shared with me that his father, a Colombian immigrant, had been in removal proceedings during Johan's 1L year and part of his 2L year. Johan had been traveling for his father's hearings and assisting him in navigating the removal process, an enterprise both time-consuming and emotionally draining. (Johan had also continued his work with the Massachusetts Attorney General's Office through his first two quarters of law school.) After the proceedings were administratively closed, Johan's grades improved significantly—all of his subsequent grades have been at or above the median, which I am fairly confident better reflects his underlying academic ability.

Nor was this the first time Johan had had to step up to support his family. Johan's parents immigrated to New York from Cali, Colombia after Johan's father and several relatives were victimized by gun violence. Both of Johan's parents were poor, even by Colombian standards—his paternal grandparents were peasant farmers and his maternal grandmother was a fishmonger. Settling in Millerton, a small town in the Hudson Valley, Johan's mother found custodial and factory work, while his father became a long-haul trucker. They divorced when Johan was still young and, at age 13, Johan began working to make ends meet for his mother, who had just given birth to his half-sister. Johan's sister was born prematurely with Down Syndrome, a heart condition, and other serious health issues. Because her father was largely absent, Johan assumed a fatherly role with her (in addition to contributing to the family's bottom line). Around the same time, Johan's father was placed in immigration detention. Despite all this, Johan graduated near the top of his high school class, matriculating at Northeastern University, from which he later graduated magna cum laude. His internship with the Massachusetts AG, along with one at the U.S. Attorney's Office in Boston, propelled him into law.

Johan has a maturity and strength of character that few of his classmates can match. He hopes to become a federal prosecutor someday, specializing in financial and computer crimes. At this early stage in his career, he's already amassed a wealth of experience relevant to that end. I expect he'll make it all the way.

As I said at the outset, I understand that Johan is a somewhat unconventional clerkship candidate. I would understand if questions remained. If they do, please do not hesitate to contact me.

Sincerely,

John Rappaport

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THE LAW SCHOOL

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Nicole Hallett
Clinical Professor of Law

May 25, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Johan Gonzalez Clerkship Application

Dear Judge Walker:

I write to recommend Johan Gonzalez for a clerkship in your chambers. I am a Clinical Professor of Law and Director of the Immigrants' Rights Clinic (IRC) at the University of Chicago Law School. IRC is a small, experiential course that enrolls 8-10 students each year. I meet with each student individually multiple times each quarter and meet with small student teams each week in addition to the weekly seminar. I also review and provide feedback on many drafts of work product throughout the year and observe and supervise fieldwork events such as client meetings and court appearances. Therefore, I get to know my clinic students very well and have the opportunity to observe them in many different contexts. Johan joined IRC in September 2022 and I have worked with him for three consecutive quarters. Based on this experience, I believe that Johan would make an excellent law clerk.

Johan worked on two very different and equally challenging cases over the course of the year. The first was a Section 1983 lawsuit we brought on behalf of a person detained as a material witness. When Johan joined the clinic, we were still developing our legal claims and he spent months trying to understand and apply the Seventh Circuit's qualified and absolute immunity jurisprudence. In the bench memo Johan wrote, he demonstrated that he had mastered the legal issues and adeptly navigated the case law, even though he had no prior experience with 1983 litigation. This, of course, is a very important skill to have as a law clerk – the ability to pick up and learn a new area of law in a matter of weeks or months. This memo went through multiple rounds of edits. Each draft showed improved comprehension of the legal issues and with legal research in general. Each meeting we had to discuss the memo led to additional questions that Johan would then go answer. Many of the issues had no clear answers; yet Johan did not stop researching because it was hard. I saw his research and writing skills improve massively over the course of the year.

In February, there was an urgent situation that arose in the case and we realized we needed to file the lawsuit in eight days when we had planned to file it in a few months. Most students would have had trouble handling the stress and the tight deadlines, but Johan did not. He worked tirelessly, overnight and all weekend, to prepare the complaint. He never lost his cool or even expressed any stress or worry at all. I am very proud of the lawsuit we filed and it never would have come together without Johan. One moment during this process showed to me the strength of Johan's character, his humility, and his integrity as a team member. He had to call me late one evening with news that we had missed a case that had major ramifications for our lawsuit the night before we were going to file. The mistake had not been his. It had been the mistake of another team member who was no longer in the clinic. Yet, he did not try to deflect blame. He took responsibility for failing to catch and had developed a plan for how to fix it. I learned later that he was not responsible for the error (not from him but by a third team member). I have the utmost respect for Johan. Lawyers must be able to admit error, learn from mistakes, and carry on in less than ideal circumstances. Johan has shown the ability to do all three in spades.

In his other case, we represent two non-citizens who were deported to Mexico after an unlawful arrest. In January, Johan and his partner filed humanitarian parole applications for them. The applications themselves contained forms, a letter brief, and a mountain of evidence that Johan had compiled from family and community members. His attention to detail and ability to juggle many different aspects of the project are competencies that would be helpful in any job, but especially in chambers where law clerks often have to take on multiple roles and projects on a small staff. In addition, Johan developed a close, trusting relationship with the clients, which serve him well as he transitions to a practicing lawyer.

Johan has told me that he wants to become a litigator and I believe a clerkship will be very helpful as he embarks on his legal career. I would be happy to speak about Johan in more detail if it would be useful to your decision-making. I can be reached at nhallett@uchicago.edu or 203-910-1980.

Sincerely,

Nicole Hallett
Clinical Professor of Law
University of Chicago Law School

NH/z

Johan Gonzalez

5135 South Drexel Avenue #3A, Chicago, IL 60615 • 845-505-0076 • Johan.h.gonzalez @gmail.com

WRITING SAMPLE

I drafted the following memorandum as a 3L student attorney for the Immigrants' Rights Clinic. The memorandum outlines the possible charges that our client could bring against local government officials who allegedly violated his civil rights and what defenses they could raise. The attached memorandum is an excerpt and includes only the section of the memorandum that discusses our client's potential Fourth Amendment claims. I received feedback from my clinic supervisor and two teammates, but received no substantive edits. I have received permission to use this as a writing sample. For confidentiality purposes, all identifying facts and names have been changed. The following provides a brief summary of the facts of the case.

While plaintiff, Carlos Ramirez, was in the custody of the U.S. Immigration and Customs Enforcement (ICE) in Nevada, Defendant Crawford County Assistant States's Attorney Tom Langton identified him as a material witness for a trial he was set to try. Defendant Langton had been made aware of Mr. Ramirez's desire to testify on behalf of the State and his eligibility for a U visa that would have allowed Mr. Ramirez to voluntarily testify and avoid deportation. Instead, Defendant Langton, in collaboration with Defendant Sergeant Paul Ross and Officer John Hardy of the Crawford County Sheriff's office, arranged with ICE to have Mr. Ramirez transferred from ICE custody and unlawfully detained at the Crawford County Detention Facility, thereby ensuring he could be returned to ICE and deported after testifying. However, the Defendants knew that they could not detain Mr. Ramirez at the request of ICE because such detention would be illegal under Michigan sanctuary laws. They were also aware that they could not detain Mr. Ramirez pursuant to the writ because it merely authorized them to bring him before a judge on the day they obtained custody of him. Despite this, the Defendants detained Mr. Ramirez for forty-eight days before bringing him before a judge. This unlawful detention was also approved by policymaking authorities within the Sheriff's Office.

ANALYSIS

I. Federal Claims Pursuant to 42 U.S.C. § 1983

42 U.S.C. § 1983 allows plaintiffs to bring claims against "[e]very person who, under the color [of law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In other words, Section 1983 provides a cause of action for those, like Mr. Ramirez, who have been deprived of their constitutional rights or other federal law protections.

A. Defendants Hardy and Ross Violated Mr. Ramirez's Fourth Amendment Right to be Free from Unreasonable Seizures

For Fourth Amendment purposes, Mr. Ramirez must first demonstrate that a government actor, acting under the color of law, deprived him of his right to remain free from "unreasonable seizures." *Graham v. Connor*, 490 U.S. 386, 394 (1989). An individual acts under the color of law when the state actor relies on their legal authority for the challenged conduct, even if it was not permitted under state law. *Ali v. Vill. of Tinley Park*, 79 F. Supp. 3d 772, 775 (N.D. Ill. 2015). Defendants Hardy and Ross were on duty, in uniform, and acted within the scope of their employment as officers with the Crawford County Sheriff's Office when they took custody of Mr. Ramirez from ICE and transported him to Crawford County.

Mr. Ramirez must then demonstrate that he was seized as a result of the Defendants' actions. *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021). A seizure generally occurs when an officer applies force to the body with intent to restrain an individual's movements. *Id*. While an arrest is the quintessential form of a seizure, pretrial detentions are also seizures for Fourth Amendment purposes. *Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 364–65 (2017) (holding that claims contesting the lawfulness of pretrial detention are governed by the Fourth Amendment). By bringing Mr. Ramirez to the Crawford County Detention Facility and checking him into the facility, the Defendants subjected Mr. Ramirez to a seizure.

While Mr. Ramirez's pretrial detention is a seizure, seizures are not per se unconstitutional. The Fourth Amendment only protects individuals against *unreasonable* seizures. *Torres*, 141 S. Ct. at 996.

Probable cause is generally "an absolute defense" to claims that the officers committed an unreasonable seizure. *Ewell v. Toney*, 853 F.3d 911, 919 (7th Cir. 2017). However, the Court has long held that this only justifies a temporary detention, and that an arrestee's pretrial restraint on his liberty is unlawful unless a judge has determined that probable cause existed at the time of arrest. *Gerstein v. Pugh*, 420 U.S. 103, 106 (1975). Thus, even assuming there were "facts or circumstances . . . that are sufficient to warrant a prudent person, or one of reasonable caution" to believe that Mr. Ramirez had committed, was committing or was about to commit a criminal offense, *Gonzalez v. City of Elgin*, the detention became unreasonable when they failed to bring Mr. Ramirez before a judge for a probable cause determination. 578 F.3d 526, 537 (7th Cir. 2009).

However, probable cause is just one way to conduct a reasonable seizure. Seizures conducted pursuant to a warrant are also generally considered reasonable. *Graham v. Connor*, 490 U.S 386, 395 (1989). While no warrant existed for Mr. Ramirez, the Defendants may argue that the writ they possessed was functionally an arrest warrant permitting Mr. Ramirez's pre-trial detention. However, on its face the writ only permitted the officers to obtain custody of Mr. Ramirez for the purpose of transporting him to court. Thus, it is unlikely that this would be treated as the functional equivalent of a warrant. Given these circumstances, Mr. Ramirez has a strong argument that the Defendants violated his Fourth Amendment right to be free from unreasonable seizures when they detained him at the detention facility.

i. Possible Defenses Available for Defendants Hardy and Ross

While Mr. Ramirez has a strong argument that Defendants Hardy and Ross violated his Fourth Amendment, the Defendants have various defenses they could raise.

a. Defendants' Actions Were Reasonable and Did Not Violate the Fourth Amendment

The Defendants may claim that Mr. Ramirez's pretrial detention was reasonable given the totality of the circumstances. *See generally Lester v. City of Chicago*, 830 F.2d 706, 711 (7th Cir. 1987) (stating that the totality of circumstances should be considered when determining whether the seizure was

justified). There are three possible arguments that Defendants Hardy and Ross could raise to suggest their conduct was objectively reasonable.

First, the officers may argue that implied in the writ, which permitted them to obtain custody of Mr. Ramirez to bring him "before the Court on January 20, 2022," was the right to seize Mr. Ramirez. *See generally Bailey v. United States*, 568 U.S. 186, 202 (2013) (A search warrant may authorize a brief seizure of the occupants of the home, as long as the intrusion on their personal liberty is limited and is outweighed by the "special law enforcement interests at stake."). While the Defendants were implicitly permitted to seize Mr. Ramirez for the purpose of bringing him before the court, the seizure should have been brief so as to limit the intrusion on his personal liberty. The Defendants may claim that their interest in ensuring his presence at trial justified a more significant intrusion on Mr. Ramirez's personal liberty, however, it's unlikely that a forty-eight day detention could be seen as outweighed by the government's interest. *See generally Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (describing pretrial detentions as being significant intrusions on liberty with serious consequences for detainees, and that given the stakes these detentions require a judicial determination of probable cause).

A second argument that may be raised is that the writ was obtained under the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (Prisoners as Witnesses Act), and as such Mr. Ramirez's seizure was reasonable. 725 MICS 235. The Prisoners as Witnesses Act permits government actors to obtain custody and detain witnesses that are in "penal facilities," when their testimony is necessary. *Id.* Given that Mr. Ramirez was a material witness being detained by ICE, the Defendants may argue that Mr. Ramirez was a witness for the purpose of the Prisoners as Witnesses Act, and as such his detention was reasonable. However, when the Defendants obtained custody of Mr. Ramirez he was *not* at a penal facility, he was at a private detention facility that houses civil immigration detainees. Civil immigration detention centers have long been understood not to be penal facilities. *Wong v. United States*, 163 U.S. 228, 235 (1896) (holding that penal punishment of immigrants without criminal charges unconstitutional); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (describing immigration detention as civil rather than penal). As such, the Act should not be construed to apply to Mr. Ramirez.

However, even if it could be interpreted to apply to him, Mr. Ramirez could argue that the Act should not be applied in such a manner because doing so would clearly violate Michigan sanctuary laws which prohibit state and local government actors from holding non-citizens detained for the purpose of turning them over to ICE.

Assuming that a judge agrees with Mr. Ramirez, the Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings (Uniform Act) would govern as to how Mr. Ramirez could be detained by the Defendants. 725 MICS 220. However, under the Uniform Act, witnesses can *only* be detained *after* they have been brought before a judge who has determined that detention is the only way to secure the witness's testimony. 725 MICS 220/2; *see People v. Johns*, 2016 MI App (1st)160480, 88 N.E.3d 1051, 1054 (2016) (Recognizing that witnesses need to be brought before a judge and *before* being incarcerated so "that [the] witness [may] be given the opportunity to sign a written undertaking to appear at trial."). Mr. Ramirez did not receive such a hearing prior to being detained or even after a reasonable amount of time after. Instead, he was detained for forty-eight days before being brought before a judge. Such a detention would violate 725 MICS 220 and should constitute an unreasonable pretrial detention.

Yet, even if a judge was to find that the Prisoners as Witnesses Act did apply, it's unlikely that Mr. Ramirez's entire detention would be considered reasonable. This is due to the fact that the circumstances that justified Mr. Ramirez's initial detention drastically changed, and the Court has long held that a change in the circumstances that justified a seizure may make the seizure unreasonable. *See Florida v. Royer*, 460 U.S. 491 (1983) (explaining that the seizure by police became unreasonable when the circumstances drastically changed). In Mr. Ramirez's case, the Defendants were made aware just one day after they detained him that ICE had administratively closed his case and as a result ICE could no longer legally hold him in detention. In other words, Mr. Ramirez was no longer a detained witness for the purpose of the Prisoners as Witnesses Act and thus the Act could no longer justify his detention.

In that case, Mr. Ramirez's detention would be governed by the Uniform Act which would require him to be brought before a judge to determine whether he could remain in detention. 725 MICS 220/2.

Given the facts of this case, it would be reasonable to assume that a judge would allow for a *reasonable* delay in getting Mr. Ramirez before the court. *Chortek v. City of Milwaukee*, 356 F.3d 740, 746–47 (7th Cir. 2004) (stating that a reasonable delay is permitted in order to account for the administrative steps required after an arrest). However, delays of over forty-eight hours are presumed unreasonable. *Id*. at 747. Mr. Ramirez's forty-seven day detention as such would be considered unreasonable. Moreover, "a delay motivated by ill will against the arrested individual" is unreasonable. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). In Mr. Ramirez's case there is evidence to suggest that the delay in getting him before a judge was motivated by the Defendants desire to evade Michigan sanctuary laws and have him deported. Such ill will certainly could not be used to justify his detention.

Assuming that the court agrees that Mr. Ramirez's detention was not reasonable under state law, the Defendants may try to argue that it was justified because of his immigration violations. While there are circumstances under which a seizure for those reasons would be justified, those situations are limited, and none of those apply here. *See Arizona v. United States*, 567 U.S. 387, 408 (2012).

While Crawford County had signed a detainer agreement, that detainer agreement was not a formal 287(g) agreement which would have justified the Defendants' seizure of Mr. Ramirez for immigration violations. While the detainer agreement demonstrates an effort to cooperate, it alone is not the functional equivalent of a 287(g) agreement because it does not subject "state officers to federal supervision or federal direction in the execution of the detainer . . . and it does not require the state officers executing it[,] the training or certification required under federal law of state officers performing the functions of an immigration officer." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 974 (S.D. Ind. 2017).

Nor is there any indication that this was part of a "joint task force with federal officers . . . executing a warrant." *Id*. at 410. The officers would also have been permitted to make the arrest if the noncitizen had been convicted of a felony but only after the state actors had consulted with the federal government, or if Mr. Ramirez had been arrested for the federal crime of "bringing and harboring certain

aliens." *Id*. at 409. Absent these grounds, Mr. Ramirez's arrest should be found to exceed the "limited circumstances" in which state officers *may* enforce federal immigration law. *Id* at 408.

b. Qualified Immunity Defense

However, even if Mr. Ramirez could demonstrate that his pretrial detention was unreasonable, the Defendants could still evade liability by invoking qualified immunity. Qualified immunity protects officers from civil liability, *unless* the constitutional or statutory right that they allegedly violated was clearly established before the incident occurred. *See Anderson v. Creighton*, 483 U.S. 635, 639–46 (1987). In determining whether qualified immunity applies, courts must determine whether the plaintiff's constitutional or statutory rights were violated and whether the right at issue was clearly established at the time the incident occurred. *Id*. Courts may start with either prong of the analysis, and if the answer to either question is no, the defendant is entitled to qualified immunity. *Taylor v. Ways*, 999 F.3d 478, 487 (7th Cir. 2021). While the Supreme Court has suggested that to preserve judicial resources, courts should begin with the second prong of the analysis, the Seventh Circuit has varied on which question they address first. *See Taylor v. Ways*, 999 F.3d 478 (7th Cir. 2021) (determining first whether there was a constitutional violation); *see also Howell v. Smith*, 853 F.3d 892, 897 (2017) ("Here, in the hope that our decision will provide meaningful additional guidance to police officers operating in the field, we address the first prong."). *But see Leiser v. Kloth*, 933 F.3d 696, 701(7th Cir. 2019) ("Because the second prong is dispositive here, we will address only whether the right at issue was clearly established under the circumstances the defendant faced.").

Given the previous discussion on whether a constitutional violation occurred, this section will focus only on the second prong of the qualified immunity analysis. Whether a right is "clearly established" depends in part on finding existing precedent that has placed the question at issue "beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). To satisfy this burden, Mr. Ramirez must show "either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance *similar* to the one at hand *or* that the violation was so obvious that a reasonable person necessarily would have recognized it as violation of the law." *Howell*, 853 F.3d at 897. While the facts of

the analogous case need not be identical, the case must have the capacity of making it clear to a "reasonable officer" in the defendants' position that his alleged actions violated the constitution. *Kloth*, 933 F.3d at 702 (7th Cir. 2019) ("This requirement does not mean [the plaintiff] had to find a case "on all fours" with the facts here.").

Given the unique facts of this case, it's unlikely that there is a single case that demonstrates that a "reasonable officer" in the Defendants' position would have noticed that their conduct violated the constitution. However, various cases may help demonstrate that a reasonable officer would have known that seizures that exceed the boundaries permitted by the circumstances are unconstitutional. Mr. Ramirez may also be able demonstrate that the violation "was so obvious that a reasonable person necessarily would have recognized it as violation of the law." *Howell*, 853 F.3d at 897.

i. Exceeding the scope of an authorized seizure is unconstitutional

If Mr. Ramirez was detained pursuant to the Uniform Act to Secure the Attendance of Witnesses, then Mr. Ramirez must demonstrate a reasonable officer in the Defendants' shoes would have reasonably known that they could not detain him without bringing him before a judge because doing so would exceed the scope of the Writ. In *People v. Johns,* the Appellate Court of Michigan reviewing an emergency motion by the petitioner to review a no-bail order entered by the circuit court after he was determined to be a material witness for an upcoming trial, stated that a material witness could only be placed in the "custody of the sheriff *only* after the witness refused to agree in writing to appear at trial." 2016 Ill. 160480, 88 N.E.3d 1051, 1054 (2016). While the Court did not hold that bypassing the process was a violation of the Constitution, the court condemned the state's attempt to "read into the statute additional circumstances that would warrant such a serious infringement on a witness's freedom." *Id*. at 1055. Moreover, in *People v. McDonald*, the Court made clear that courts were required to "balance the need for a witness to appear at trial with the witness's constitutional right to freedom from unnecessary restraint" when determining whether to hold a material witness in custody. 322 Ill. App. 3d 244, 247, 749 N.E.2d 1066 (2001). These two cases, Mr. Ramirez could argue sufficiently put a "reasonable officer" on notice

that a material witness may not be held in custody without first being given the opportunity to sign a written undertaking to appear at trial and that failure to do so violates the individuals fourth amendment rights to be free from unreasonable seizures. Moreover, while *Gerstein v. Pugh* does not explicitly address witnesses in pretrial detention, the Court's procedural protection on pretrial detainees focuses on the rights of the individual rather than their status or what justified their detention and as such could be argued should have given the Defendants sufficient notice. 420 U.S. 103 (1975).

Alternatively, if Mr. Ramirez's initial detention was justified under the Prisoners as Witnesses Act, then it must be demonstrated that case law exists that would have put a reasonable officer in the Defendants' shoes on notice that when the circumstances that justified an initial seizure change, the seizure is no longer reasonable and in violation of the Fourth Amendment. That idea is not novel. The Supreme Court has clearly stated that reasonable seizures can become unreasonable when the seizure "exceed[s] that permitted by the terms of a validly issued warrant," and when the circumstances justifying a limited seizure materially change. *Horton v. California*, 496 U.S. 128, 140 (1990); *see also Florida v. Royer*, 460 U.S. 491 (1983) (explaining that the seizure by police became unreasonable when the circumstances changed drastically).

While these cases could be used to demonstrate that a reasonable officer in the defendants' shoes knew their conduct would violate Mr. Ramirez's Fourth Amendment rights, the facts of these cases are not analogous enough to Mr. Ramirez's case which could lead a court to hold otherwise. *See Kloth*, 933 F.3d at 703–04 (discussing that while the general principle had been "clearly established," the facts of the other cases cited, the differences in procedural posture and standard of review undermined "that the right at issue here was clearly established.").

ii. Patently obvious constitutional violations are not protected by qualified immunity

While an analogous case may not exist, the second prong can also be satisfied by demonstrating that the Defendants' conduct was "so outrageous that no reasonable [] officer would have believed the conduct was legal." *Id*. at 704. While this is a viable way of defeating the qualified immunity defense, the Seventh Circuit has made it clear that this occurs only in "rare cases," where the constitutional violation is

"patently obvious," and as such the plaintiffs may not need to cite closely analogous cases because "widespread compliance with a clearly apparent law may have prevented the issue from previously being litigated." *Id.* (quoting *Jacobs v. City of Chicago*, 315 F.3d 758, 767 (7th Cir. 2000).

The Supreme Court has long held that the "Fourth Amendment requires a timely judicial determination of probable cause" either before the detention or shortly thereafter. *See Gernstein v. Pugh*, 420 U.S. 103, 114–15 (1975). While Mr. Ramirez had not been detained after being arrested by an officer who believed he had probable cause to believe he had engaged or was engaging in criminal activity, Mr. Ramirez's detention was nonetheless a seizure for Fourth Amendment purposes and as such warrants the same protections. *See Manuel v. City of Joliet, Ill.*, 580 U.S. 357 (2017) (pretrial detentions are seizures under the Fourth Amendment). Whether detained pursuant to an arrest or not, the pretrial detention implicates the same rights that motivated the Courts holding in *Gerstein*. *Id.* ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest . . . . When the stakes are this high, the detached judgement of a neutral are essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."). The state of Michigan has also acknowledged the importance of these protections in enacting laws that require witnesses to be brought before a judge and that *before* being incarcerated "that [the] witness [] be given the opportunity to sign a written undertaking to appear at trial." *Johns*, 88 N.E.3d at 1054. Given the Supreme Court precedent, Michiga State Court precedent, and state law, Mr. Ramirez has a strong argument that the Defendants failure to bring him before a judge is a "patently obvious" constitutional violation. *Jacobs v. City of Chicago*, 315 F.3d 758, 767 (7th Cir. 2000).

The Defendants may argue that Mr. Ramirez was eventually brought before a court, and as such no violation occurred. While Mr. Ramirez was *eventually* brought before a court, the Seventh Circuit has held that these pre-process detentions may not be excessive, and delays in bringing individuals before a judge must be *reasonable*. *Chortek v. City of Milwaukee*, 356 F.3d 740, 746–47 (7th Cir. 2004). Mr. Ramirez bears the burden of establishing that his pre-process detention was excessive. *Portis v. City of Chicago*, 613 F.3d 702, (7th Cir. 2010).

The Court has determined that a forty-eight-hour detention is presumptively reasonable in the context of probable cause determinations. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). "In the case of detentions over forty-eight hours, the government bears the burden of proving an emergency or other extraordinary circumstance which justifies the delay" in getting the individual before a judge. *Chortek*, 356 F.3d at 747. Again, while these cases concern probable cause hearings for individuals charged with committing a crime, Mr. Ramirez has the same interest as those plaintiffs in ensuring that his Fourth Amendment rights aren't "at the mercy of the officers' whim or caprice." *Gernstein*, 420 U.S. at 862. Given that both detentions implicate the same rights and raise the same concerns, the procedural protections should not differ. However, even if more leniency was provided to the government under these circumstances, Mr. Ramirez was held in pre-trial detention for nearly two months before receiving his statutorily required hearing. Given these circumstances, the Defendants actions could be characterized as patently unlawful, and as such unprotected by qualified immunity.

Mr. Ramirez could also argue that his detention was "patently unlawful" because it was done for the purpose of enforcing civil immigration laws. In *Arizona v. United States*, the Court clearly stated local and state officers are generally prohibited from seizing nonimmigrants for civil immigration violations. 567 U.S. 387 (2012). Mr. Ramirez can point to various communications between the Defendants and ICE to demonstrate that the Defendants only sought to detain Mr. Ramirez to cooperate with ICE to have Mr. Ramirez deported. Mr. Ramirez may also use those communications to help show that the Defendants knew that their conduct was illegal under state law and that there were alternative *legal* means to obtain Mr. Ramirez's testimony. While *Arizona v. United States* would not satisfy the clearly established law requirement, this case could serve to demonstrate that the Defendants actions were "so obvious that a reasonable person necessarily would have recognized it as violation of the law." *Howell*, 853 F.3d at 897.

Mr. Ramirez has a particularly strong argument considering that there were additional state laws that prohibited such behavior and that such laws had received broad coverage across the state. Moreover, the Seventh Circuit has signaled their belief that even an overnight detention for the purposes of transferring an individual to ICE may violate an individual's Fourth Amendment rights. *Lopez-Aguilar v.*

Marion County Sheriff's Department, 924 F.3d 375, 381–82 (7th Cir. 2019) (dismissing the case for other reasons but stating that the officer's actions as alleged in the complaint were an instance of illegal conduct).

B. Monell Claim: Crawford County Sherriff's Office

Even if Defendants Hardy and Ross's actions are ultimately protected by qualified immunity, Mr. Ramirez may still succeed with his *Monell* claims against the Crawford County Sheriff's Office, for they are not protected by qualified immunity. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (reemphasizing that qualified immunity does not apply to government entities). Section 1983 claims may be brought against local government entities, including police departments and municipalities as long as they are not the state or an arm of the state. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978); *See also Moor v. County of Alameda*, 411 U.S. 693, 717–25 (1973). However, local government entities may not be held liable under the theory of respondeat superior and may only be held liable when the constitutional deprivation is proximately caused by the governmental entity. *Monell*, 436 U.S. at 692. Moreover, they may not be held liable where there has been no constitutional violation. *Heller*, 475 U.S. at 799.

There are four ways to establish municipal liability. First, plaintiffs may point to a formal promulgated policy. *Monell*, 436 U.S. at 692. They may also point to a well-settled custom or practice that is not written or formally adopted, but that is a pervasive, long-standing practice that has the force of law. *Id*. at 691. The third method requires that the plaintiff demonstrate that a final decision was made by someone with policymaking authority for the government entity. *Pembaur v. City of Cincinnati*, 475 U.S. 469, (1986). A single act or decision by a final policymaking authority may be sufficient for the purposes of bringing a *Monell* claim. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482–83 (1986)). Monell liability may also apply if a plaintiff is able to demonstrate that failure to train, supervise, and screen employees caused the harm they suffered. *See City of Canton v. Harris*, 489 U.S. 378 (1989).

Mr. Ramirez may attach *Monell* liability by demonstrating that a final decision was made by someone with policymaking authority or alternatively that the individual with policymaking authority delegated that authority to another person whose decision proximately caused Mr. Ramirez's unlawful detention. *Praprotnik*, 485 U.S. at 126. ("If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, Section 1983 could not serve its intended purpose."). The identification of a policymaking official is a question of state law. *Id* at 124. Under Michigan law, the Crawford County Sheriff Eric Roberts is the warden of the Crawford County Adult Detention Facility. 730 MICS 125/2 ("The Sheriff of each county in this State shall be the warden of the jail of the county."). Thus, Mr. Ramirez can establish municipal liability if he can proffer evidence that reasonably suggests that Sheriff Roberts approved his unlawful detention.

However, absent this, Mr. Ramirez would need to present evidence that Sheriff Roberts delegated his policymaking authority to the individual that approved his detention. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (stating that policymaking authority may be delegated). The defense may argue that *DeGenova v. Sheriff of DuPage County* establishes that Michigan sheriffs have exclusive final policymaking authority over jail operations and thus Sheriff Roberts could not have delegated his policymaking authority. 209 F.3d 973, 975-76 (7th Cir. 2000). However, that case establishes only that in Michigan sheriffs generally hold policymaking authority over jail operations. It does not address whether they can delegate that authority, and in fact in Michigan, State law permits Sheriffs to delegate such authority by appointing Deputy Sheriffs who may "perform any and all duties of the Sheriff, in the name of the sheriff, and the acts of such deput[y] shall be held to be acts of the sheriff." 55 MICS 5/3-6015.

In 2017, Sheriff Roberts utilized this power by appointing Chester Brown to be a Chief Deputy Sheriff as well as the Warden of the detention facility. Brown remained in this position through Mr. Ramirez's detention and was one of the officers who Chief Deputy Daniel Peters forwarded Defendant Ross's email to, requesting clearance to detain Mr. Ramirez at the Detention Facility to cooperate with ICE. While Brown's title of Warden would seem to indicate that he had in fact been delegated policymaking authority by Sheriff Roberts, the title alone is insufficient evidence to establish delegation

of such authority. *Gonzalez v. McHenry County*, 40 F.4th 824, 827 (7th Cir. 2022). Mr. Ramirez, however, does not need to have direct evidence that the delegation of authority occurred, instead, he may rely on indirect evidence that raises an inference that Warden Brown was in fact delegated policymaking authority by Sheriff Roberts. *See Kujawski v. Board of Com'rs of Bartholomew County, Ind.*, 183 F.3d 734, 739–40 (7th Cir. 1999). Moreover, Mr. Ramirez would not have to show that Warden Brown was delegated all of the Sheriff's policymaking authority as Warden of the detention facility. Instead, all that Mr. Ramirez would have to demonstrate is that Warden Brown was given "the power to make official policy on *a particular issue*," in his case regarding detentions at the facility. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (quoting at *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989)); *see also Valentino v. Village of South Chicago Heights,* 575 F.3d 664, 676 (7th Cir. 2009).

Given that there is no direct evidence establishing that Sheriff Roberts delegated his policymaking authority to Warden Brown, Mr. Ramirez will have to rely on indirect evidence. Specifically, Mr. Ramirez can argue that while Warden Brown's title does not establish delegation of policymaking authority, his responsibilities at the facility suggests that he was delegated policymaking authority over detentions. In support of this argument, Mr. Ramirez can point to Warden Brown's responsibility to review and revise the rules that detainees must comply with and his duty to "direct and administer the jail on a daily basis." *Gonzalez v. Josephson*, No. 14-CV-4366, 2019 WL 1013737 at *11 (N.D. Ill. 2019). Additionally, Sheriff Roberts has stated that Warden Brown is the one who is at the detention facility "40 hours a week" managing the facility and "running the everyday operations," not him. *Baker v. Crawford County Sheriff Eric Roberts Et al.*, Docket No. [redacted]-cv-[redacted] ([redacted] July 07, 2022) (Eric Roberts' Deposition). Sheriff Roberts has also made clear that Warden Brown is given broad discretion to operate the detention facility. *Id*. (Sheriff Roberts stating that he doesn't "micromanage" Warden Brown and allows him to manage the facility given his better familiarity with the operation of the facility). Given the broad discretion that Warden Brown is given to operate the facility and determine policies for detainees, as well as his title, and the fact that it was him who was asked whether Mr. Ramirez could be detained at the facility, Mr. Ramirez could successfully argue that

Warden Brown was delegated policymaking authority over detentions at the facility at least for the purpose of surviving a motion to dismiss and obtaining discovery. Discovery should help Mr. Ramirez conclusively determine whether Warden Brown had policymaking authority over detentions at the facility, and whether Sheriff Roberts intended to delegate that power to him. *See Awalt v. Marketti*, 74 F. Supp. 3d 909, 933–34 (N.D. Ill. 2014).

If Mr. Ramirez can demonstrate that Warden Brown had policymaking authority, then Warden Brown's authorization of Mr. Ramirez's detention could be used to attach *Monell* liability to the Crawford County Sheriff's Office. However, for that to attach, Mr. Ramirez would still need to demonstrate that Brown's approval "directly caused the constitutional violation." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 239 (7th Cir. 2021); *see also Gonzalez v. McHenry County, Illinois*, 40 F.4th 824, 829 (7th Cir. 2022) ("the plaintiff must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."). In Mr. Ramirez's case, his detention at the Crawford County Adult Detention Facility *would* not have occurred had Warden Brown rejected Defendant Ross's request to detain Mr. Ramirez for the purpose of assisting ICE.

While the Crawford County Sheriff's Office may argue that it was Defendant Langton who was the "moving force" behind Mr. Ramirez's detention since it was his conduct that got the ball rolling. Moreover, given that Defendant Langton is not a policymaking authority for the Crawford County Sheriff's Office, *Monell* liability cannot attach. However, this interpretation should fail given that the Court has long held that to demonstrate that someone was the "moving force" behind an injury, the plaintiff must only "show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). In Mr. Ramirez's case, absent Brown's approval, Mr. Ramirez *could not* have been detained at the facility. Moreover, the email that he received should have reasonably put him on notice that Mr. Ramirez's detention was unlawful because it was done entirely to aid ICE in violation of state law. As such, Mr. Ramirez could reasonably succeed on his *Monell* claims against the Crawford County Sheriff's Office.

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2019**
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Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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June 12, 2023

The Honorable Jamar K. Walker
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Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year law student at the University of Southern California Gould School of Law and am interested in a clerkship in your chambers starting in the summer or fall of 2024. Because of my keen interest in legal writing and litigation, I was particularly pleased to note the clerkship posting for your chambers on OSCAR. After earning my law degree, I would like to enhance my legal research and writing skills under your mentorship and gain practical experience in a federal district court. With my strong interest in becoming a litigator, I also look forward to working on pending cases and learning about motions practice firsthand while also joining the community of a new state such as Virginia. I believe that the learning experience of clerking for a judge such as yourself would be invaluable to my continuing legal education and career.

My previous academic and leadership experience would make me an asset to your chambers. As a judicial extern on the United States Court of Appeals for the Ninth Circuit to the Hon. Kim McLane Wardlaw, I developed strong research, analytical, and writing skills, and had the opportunity to work in and contribute to a judicial chambers. While in law school, I have excelled in USC's Legal Research, Writing, and Advocacy program and currently serve as a Legal Writing & Advocacy Fellow to the first year classes. Additionally, as the incoming Editor-in-Chief of the *Southern California Law Review*, I look forward to working closely with my peers and scholars in the legal field while furthering my writing and editing skills. Given my experience, I am confident that I possess the skillset—as well as the dedication and enthusiasm—to meaningfully contribute to your chambers.

For your review, I have attached my resume, undergraduate and law school transcript, legal writing sample, and letters of recommendation. I would be happy to send a list of references and update my application once the remainder of spring grades are posted. Please do not hesitate to contact me should any further information be helpful in your review. I would welcome the opportunity to interview with you and can be reached at (661) 487-7042 or madeline.goossen.2024@lawmail.usc.edu. Thank you for your time and consideration.

Respectfully,

Madeline Goossen

Madeline Lei Momi Goossen

Pasadena, California | madeline.goossen.2024@lawmail.usc.edu |(661) 487-7042

EDUCATION

University of Southern California Gould School of Law May 2024
Juris Doctor Candidate GPA: 3.60

Journal: *Southern California Law Review*, Volume 97 Editor-in-Chief; Volume 96 Staff Editor
Honors Grades: Legal Research, Writing, and Advocacy I & II (highest grade in section); Criminal Law; Legal Profession; Torts; Constitutional Law Structure; Constitutional Law Rights; Judicial Opinion Writing; Writing for Publication; Pretrial Advocacy, The Modern Supreme Court
Leadership: Women's Law Association, Alumni Chair; Older Wiser Law Students, Co-Vice President; Student Bar Association, Awards Chair; First Generation Professionals, 1L Representative

University of Southern California May 2019
Bachelor of Arts, History and Political Science (double major), *magna cum laude* GPA: 3.88

Honors: Phi Beta Kappa; Discovery Scholar; Renaissance Scholar; Dornsife Dean's List (eight semesters)
Leadership: Journal of Law and Society, Editor-in-Chief; Model United Nations, Under Secretary General

EXPERIENCE

Jeffer Mangels Butler & Mitchell LLP Los Angeles, CA
Litigation Summer Associate May 2023—present

- Participate in client meetings, prepare for hearings and oral argument, conduct legal research, draft memoranda, motions, and briefs on pending cases, and aid in pro bono projects and representation.

USC Gould School of Law Los Angeles, CA
J.D. Legal Writing & Advocacy Fellow August 2022—present

- Teach legal citation and grammar lessons to the 1L Legal Research, Writing, and Advocacy class, grade legal writing assignments such as memoranda and briefs, and prepare students for appellate style oral argument.

Teaching Assistant to Professors Darrow, Grabarsky, and Haddad August 2022—present

- Aid in course development, lead weekly discussion sections, grade papers and exams, manage class Blackboard, and review and prepare class materials for LAW 101: Law and the U.S. Constitution in Global History, LAW 225: Current Court Cases, and LAW 300: Concepts in American Law.

Research Assistant, Professor Gross May—December 2022

- Conducted legal and historical research for a book on the politics and memory of slavery and the Constitution.

United States Court of Appeals for the Ninth Circuit Pasadena, CA
Judicial Extern, Hon. Kim McLane Wardlaw August—December 2022

- Researched and wrote bench memoranda on pending cases and recommendation memoranda on cases called en banc, drafted responses to petitions for rehearing, and aided in drafting, editing, and cite-checking opinions.

Office of County Counsel Los Angeles, CA
Legal Intern, Health Services Division May—July 2022

- Processed Public Record Act requests and wrote settlement memoranda on lawsuits brought against the Department of Public Health. Assisted in the research and drafting of a county ordinance outlawing ghost guns.

USC Student-Athlete Academic Services Los Angeles, CA
Mentor Tutor August 2017—May 2019

California Strategies & Unruh Institute of Politics Los Angeles, CA
Research Intern January – December 2017

INTERESTS

Musical theatre, professional cycling, volunteering with animals, vegan baking, the New York Times Crossword

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Goossen, Madeline, L.	8517-7386-18	06-11-2023	1 of 5

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

ISSUE TO:

CONTROL #: 000002388535

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

Current Program of Study

01/18/2021 Juris Doctor — Law

USC Degrees Awarded

05/10/2019 Bachelor of Arts — Political Science
Magna Cum Laude
Renaissance Honors
Discovery Honors

Bachelor of Arts — History

Transfer Credit By Exam

Date:	Units:	Exam:
06/14	4.00	AP: American History
06/14	4.00	AP: English Language/Composition
06/15	4.00	AP: American Government & Politics

Transfer Detail Information

Undergraduate Units Attempted: 12.00 Earned: 12.00 Available: 12.00 Grade Points: 0.00 GPA: 0.00
Advanced Placement Credit Begin: 06/01/2013 End: 08/28/2015 Units Attempted: 12.00

USC Cumulative Totals

Undergraduate Units Attempted: 124.0 Earned: 124.0 Available: 124.0 GPA Units: 114.0 Grade Points: 442.80 GPA: 3.88
Law Units Attempted: 60.0 Earned: 57.0 Available: 57.0 GPA Units: 47.0 Grade Points: 169.50 GPA: 3.60

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Goossen, Madeline, L.	8517-7386-18	06-11-2023	2 of 5

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Fall Semester 2015 (08-24-2015 to 12-16-2015)

GESM-120g	A	4.0	Seminar in Humanistic Inquiry (The Russian Novel)
POSC-130g	B+	4.0	Law, Politics and Public Policy
FSEM-100	CR	2.0	Freshman Seminar (Post-9/11 America and the Death of Privacy)
FREN-150	A-	4.0	French II
ECON-203g	A	4.0	Principles of Microeconomics

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	16.0	60.00	3.75

Spring Semester 2016 (01-11-2016 to 05-13-2016)

FREN-220	P	4.0	French III
IR-210gw	A	4.0	International Relations: Introductory Analysis
WRIT-150	B+	4.0	Writing and Critical Reasoning--Thematic Approaches (Issues in Law and Social Justice)
LAW-101w	A	4.0	Law and the U.S. Constitution in Global History

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	12.0	45.20	3.76

Fall Semester 2016 (08-22-2016 to 12-14-2016)

AHIS-120gp	A-	4.0	Foundations of Western Art
HIST-385	A	4.0	Anglo-American Law before the 18th Century
POSC-370	A-	4.0	European Political Thought I
HIST-201	A	4.0	Approaches to History

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	16.0	61.60	3.85

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Goossen, Madeline, L.	8517-7386-18	06-11-2023	3 of 5

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Spring Semester 2017 (01-09-2017 to 05-12-2017)

POSC-421	A	4.0	Ethnic Politics
HIST-498	A	4.0	Seminar on Selected Historical Topics (Global History of War Crimes.)
POSC-395	A	2.0	Directed Governmental and Political Leadership Internship
SSCI-265Lg	P	4.0	The Water Planet
HIST-275g	B+	4.0	The Worlds of the Silk Road

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	14.0	53.20	3.80

Fall Semester 2017 (08-21-2017 to 12-13-2017)

POSC-395	A	2.0	Directed Governmental and Political Leadership Internship
HIST-327	A	4.0	Twentieth Century Britain
WRIT-340	A	4.0	Advanced Writing (Advanced Writing for Pre-Law Students)
POSC-323	A	4.0	Applied Politics (Message and Media: Great Races from City Hall to the White House)

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
14.0	14.0	14.0	56.00	4.00

Spring Semester 2018 (01-08-2018 to 05-11-2018)

THTR-295	A	2.0	Theatre in Los Angeles
POSC-360	A	4.0	Comparative Political Institutions
PSYC-165Lg	A	4.0	Drugs, Behavior, and Society
HIST-395	A	4.0	Sex and the City: Constructing Gender in London, 1700-1900
POSC-340	A-	4.0	Constitutional Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	70.80	3.93

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Fall Semester 2018 (08-20-2018 to 12-12-2018)

HIST-498	A	4.0	Seminar on Selected Historical Topics (The Histories of the Apocalypse)
POSC-426	A	4.0	The United States Supreme Court
WRIT-440	A	4.0	Writing in Practical Contexts (Advanced Legal Writing)

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
12.0	12.0	12.0	48.00	4.00

Spring Semester 2019 (01-07-2019 to 05-10-2019)

HIST-102mg	A	4.0	Medieval People
HIST-462	A	4.0	20th Century American Thought
SWMS-349	A	4.0	Women and the Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
12.0	12.0	12.0	48.00	4.00

Fall Semester 2021 (08-23-2021 to 12-15-2021)

LAW-530	CR	1.0	Fundamental Business Principles
LAW-515	3.9	3.0	Legal Research, Writing, and Advocacy I
LAW-503	3.4	4.0	Contracts
LAW-502	3.0	4.0	Procedure I
LAW-509	3.8	4.0	Torts I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	15.0	52.50	3.50

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Spring Semester 2022 (01-10-2022 to 05-13-2022)

LAW-516	4.0	2.0	Legal Research, Writing, and Advocacy II
LAW-505	3.5	3.0	Legal Profession
LAW-504	3.7	3.0	Criminal Law
LAW-508	3.5	3.0	Constitutional Law: Structure
LAW-507	3.4	4.0	Property

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	53.70	3.58

Fall Semester 2022 (08-22-2022 to 12-14-2022)

LAW-781	CR	4.0	Externship I
LAW-873	3.8	3.0	Judicial Opinion Writing
LAW-870	CR	2.0	Legal Writing Fellows
LAW-766	3.9	3.0	Writing for Publication Seminar
LAW-767A	CR	1.0	Law Review Staff

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	6.0	23.10	3.85

Spring Semester 2023 (01-09-2023 to 05-12-2023)

LAW-685	3.9	2.0	The Modern U.S. Supreme Court
LAW-820	3.6	3.0	Pretrial Advocacy
LAW-602	3.4	3.0	Criminal Procedure
LAW-870	CR	1.0	Legal Writing Fellows
LAW-532	3.8	3.0	Constitutional Law: Rights
LAW-767B	CR	1.0	Law Review Staff

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	11.0	40.20	3.65

---------- End of Transcript ----------

ACADEMIC TRANSCRIPT INFORMATION

NOTE: *The information that follows represents current University policies. Questions regarding historical University policies and/or transcript notations should be addressed to the Office of the Registrar. This document contains a number of security features. Further information or authentication can be obtained by calling the Office of the Registrar (213) 740-9230.*

COURSE CREDIT/UNIT VALUE
A semester unit is a credit of one hour per week for one semester (15 weeks in length).

COURSE NUMBERING AND CLASSIFICATION
The first digit of the course indicates the year level of the course. 000-preparatory courses; 100-first undergraduate year; 200-second undergraduate year; 300-third and fourth undergraduate years without graduate credit; 400-third and fourth undergraduate years with graduate credit for graduate students; 500-first graduate year; 600-second graduate year; and 700-third graduate year.

GRADING SYSTEM
The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit. D, minimum passing in undergraduate courses; and F, failed. Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass. The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL
A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course. A, 4.0 points; A-, 3.7 points; B+, 3.3 points; B, 3.0 points; B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 points; D-. 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average. There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of Freshman (less than 32 units earned), Sophomore (32 to 63.9 units earned), Junior (64 to 95.9 units earned) and Senior (at least 96 units earned). GRADUATE is comprised of any coursework attempted while pursuing a master's and/or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree. Other is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

CLASS RANK
The University of Southern California does not calculate or support a class rank for its undergraduate students. While most graduate programs do not rank students, requests for graduate student class rankings should be directed to the dean of the particular school in which the graduate degree was earned.

STUDENT GOOD STANDING
A student is considered to be in good standing if they are eligible to register for classes. Disciplinary good standing is determined by the Office of Community Expectations.

TRANSFER CREDIT
Coursework accepted from other institutions is summarized into undergraduate and graduate areas. The summary information includes the number of units and GPA. The transfer institution(s) and dates of attendance do not appear on the USC transcript.

GOULD SCHOOL OF LAW GRADING SYSTEMS
Beginning in Fall 2022, courses are graded numerically from 4.0 to 1.9, with letter-grade equivalents ranging from A to F. The grade equivalents are 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2012 through Spring 2022, courses were graded numerically from 4.4 to 1.9, with letter grade equivalents ranging from A+ to F. The grade equivalents are 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2001 through Spring 2012, courses were graded numerically from 4.4 to 1.9, with letter grade equivalents ranging from A+ to F. The grade equivalents are 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.0 (D); and 1.9 (F).

Prior to Fall 2001, the grading system consisted in numbers in a range from 90 to 65. A grade of 90 was equivalent to highest honors and was very rare; 89 to 85 high honors; 84 to 80, honors; 79 to 70, satisfactory; 69 to 66, unsatisfactory; and 65, failing.

OSTROW SCHOOL OF DENTISTRY GRADING SYSTEM
Students admitted to the Doctor of Dental Surgery program in Fall 1990 or later and students admitted to the International Student Program in Summer 1991 or later, are bound by the University's grading system (excluding plus/minus grades), which is detailed *above* under the heading "GRADING SYSTEM." Academic records for dentistry students who attended prior to the dates listed above are housed independent of the University's central record system. Contact the Ostrow School of Dentistry directly for this earlier academic record information.

KECK SCHOOL OF MEDICINE TRANSCRIPTS
Transcripts for medical students are housed independent of the University's central records system. Contact the School of Medicine directly for this academic record information.

LANGUAGE OF INSTRUCTION
English is the language of instruction at USC. All courses are taught in English with the exception of a few advanced language courses.

ACCREDITATION
The University of Southern California is fully accredited by the Western Association of Schools and Colleges. For additional professional accreditation information, please refer to the latest issue of Accredited Institutions of Postsecondary Education published by the American Council on Postsecondary Accreditation (COPA).

Rev.02/2023

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Madeline Goossen for a position as a clerk in your chambers. Over the last two years, I have come to know Madeline quite well. First, I had the pleasure of having her as a student in my legal-writing class, which is a year-long class with only fifteen students. As part of that class, I personally review multiple assignments written by each student. I am happy to report that Madeline received one of the highest grades in my class because she is an outstanding writer.
Additionally, I got to know Madeline even better during her second year of law school while she was a “writing fellow.” At USC, most of our first-year legal writing classes are taught to part-time instructors, who are paired with a second- or third-year student to assist them. As the Associate Director of Legal Writing, I help train and supervise all the writing fellows. Becoming a writing fellow is a competitive process. We invited Madeline to be a writing fellow because she is not only a great writer but also intelligent, hard-working, organized, responsible, and mature. Also, from watching her interact with other people, I know that she is polite and professional. In short, Madeline is an outstanding student and teaching assistant. I wish we had more students like her.

Lastly, my recommendation is based on both my experience as a professor and my prior career as a practicing lawyer. Before becoming a fulltime faculty member in 2007, I was an Assistant United States Attorney in the Central District of California for seventeen years. During that time, I became familiar with the work performed by judicial law clerks. I am certain that Madeline will be an outstanding clerk. She knows how to thoroughly research a complex legal issue, and write a clear, concise, and complete analysis. Perhaps more important, she exercises independent judgment to make sure that whatever task she is assigned is successfully completed. If I were a judge, I would be happy to hire her. Please feel free to contact me if you have any questions or concerns.

Sincerely,

REBECCA S. LONERGAN

Rebecca Lonergan - rlonergan@law.usc.edu - 213-740-5599

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Madeline Goossen was one of seven students in my intensive writing workshop, Judicial Opinion Writing (Law 873), where I got to know her as a writer and a colleague. I consider it my great good fortune that she is helping me now as a research assistant and will serve this fall as a teaching assistant for another of my courses. Madeline is smart, works hard, and has good judgment and a calm temperament. She has demonstrated her ability to draft insightful and well-organized judicial opinions. She would be an asset to your chambers from day one, and I highly recommend her to you.

Madeline's principal writing projects were to draft and, after receiving comments, to improve a majority opinion in Andy Warhol Foundation v. Goldsmith, and a separate opinion in Mallory v. Norfolk Southern Railway Co.; each case was then-pending in the U.S. Supreme Court. To prepare for drafting these opinions, she edited a published opinion pertinent to the Warhol case (Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)) that offered many opportunities for stylistic improvement, which she seized with confidence to excellent effect.

Based on her edit of Bleistein and her thoughtful contributions in class and in homework assignments, I had high expectations for Madeline's majority opinion, which she fully met. Her opinion was well-structured and written with a firm judicial voice. What made it outstanding, however, was the original and perceptive way that Madeline reasoned that three questions "emerge," from the statutory provision at issue (17 U.S.C. § 107) and the Court's precedent, that were essential to the resolution of the question presented. Her analysis was both original, in that neither the parties nor the cases had framed the analysis in just this way, and sound, in that these were indeed the key issues that the Court eventually would confront and need to resolve in deciding the case. After providing a carefully reasoned assessment of each question, Madeline's opinion responds respectfully and appropriately to each of the principal arguments on which the losing party chiefly relied. The opinion is concise, well-reasoned, and persuasive.

Madeline wrote her separate opinion in Mallory as a concurrence to the very able majority opinion of a fellow student. While agreeing with the result and much of the reasoning, Madeline devoted her concurrence to an original and interesting assessment of the difficult question of when the Court should overrule, as opposed to merely distinguish, a prior opinion that time and precedent have pushed to the sidelines. This opinion again marked her as an unusually thoughtful writer who sets high standards for herself that she then comfortably meets.
Madeline worked hard not only to write good opinions but to help her classmates write the best opinions that they could. She carefully read her classmates' drafts and consistently offered thoughtful suggestions, both in writing and during class discussions. She is ready to participate in the collaborative environment of a judicial chambers and provide others with valuable assistance.

Finally, I have seen the tremendous contributions that Madeline can make not simply in the classroom but as a research assistant. She is excellent at brainstorming, at providing useful research support, and at following up on a list of tasks. On a personal level, Madeline is good-humored and sincere. I am confident that you will value her contributions and enjoy having her as a colleague in chambers.

Please do not hesitate to contact me if you have any questions.

Very truly yours,
/s/ Mark E. Haddad

Mark E. Haddad
Adjunct Lecturer in Law
USC Gould School of Law
mhaddad@law.usc.edu

From: Laura Perry
Re: Madeline Goossen Recommendation Letter
Date: June 6, 2023

I am currently a judicial law clerk for the Honorable Judge Kim McLane Wardlaw for the Ninth Circuit Court of Appeals. I write to recommend Madeline Goossen for a judicial clerkship in your chambers.

I know Madeline from her time serving as a judicial extern in Judge Wardlaw's chambers during the Fall 2022 semester. I worked closely with Madeline during the four-month course of her externship and served as her direct supervisor. From this experience, I saw first-hand that Madeline has the skills to excel at a judicial clerkship.

Madeline's strong writing and legal analysis skills were apparent from our work together. Madeline drafted a 25-page bench memorandum for a challenging civil rights disability case—a task often performed by judicial law clerks. From Madeline's first draft, it was clear that she had thoroughly and extensively researched the current state of the law, had carefully organized the relevant issues, and had crafted a clear, objective memorandum that served as guide for oral argument preparation.

Throughout the editing process, Madeline was responsive to feedback and eager to learn and improve her writing. We had numerous discussions about the nuances of the issues at play in the case. Madeline articulately explained her positions, asked thoughtful questions, and was able to communicate her reasoning clearly both orally and in writing.

From working with Madeline on this project and others, I also saw first-hand her work ethic and dedication to her externship. Our externs are full-time, and Madeline was also balancing many other responsibilities during her externship including working on Law Review (she later became Editor-in-Chief), taking two law school classes, working as a research assistant to a professor, serving as a teaching assistant for two classes, and serving on the board of two student groups. She was able to not only balance, but also exceed expectations in the many tasks thrown at her as a full-time extern with competing responsibilities.

Most importantly, it was a pleasure to work with Madeline. Madeline is charismatic, has a great sense of humor, and worked as a team player with the other externs and law clerks. We would have lunch together a few times a week,

and Madeline would always make the group laugh. I have no doubt she will be a joy to have around in chambers and will work well with any group of law clerks. Madeline expressed to me numerous times her desire to clerk, and I think her time as an extern has provided her with a head start in her pursuit.

Madeline was a superb extern, and she has all the skills required to be a stellar judicial law clerk. I highly recommend her.

Madeline Lei Momi Goossen

Pasadena, California | madeline.goossen.2024@lawmail.usc.edu |(661) 487-7042

Writing Sample

Attached is a bench memorandum written in the fall of 2022 as part of a judicial externship and under the supervision of a law clerk. This is an early draft of the final bench memorandum and was not directly edited by another person, though the initial outline received verbal feedback. All names, dates, locations, and other key identifying characteristics have been altered to maintain confidentiality.

BENCH MEMORANDUM

TO: Judge Wardlaw
FROM: Madeline Goossen, extern to Judge Wardlaw (supervised by Laura Perry, law clerk to Judge Wardlaw)
RE: *Smith v. Brennan*, No. 00-12345
DATE: Fall 2022

Argument Date:	Fall 2022
Appeal From:	C.D. Cal.
Notice of Appeal:	January 2022 (timely)
Jurisdiction on Appeal:	28 U.S.C. § 1291
Decision on Review:	Grant of Summary Judgment and Judgment in Favor of Defendant
Nature:	Civil
Weight:	5
Recommendation:	**REVERSE AND REMAND**

OVERVIEW

Abigail Smith lives with multiple physical and mental impairments and at the recommendation of her physician, lives with an emotional support dog named Parsnip. In May 2020, Smith and her friends Sasha Grant and Brian Lloyd applied to rent a home owned by Paul Brennan in Capitola, California. Although the rental advertisement stated, "no dogs," Grant and Smith submitted an application and disclosed that their household would include "1 registered support animal (12-year-old Labrador mix)" in addition to the three adults.

Brennan responded to the application restating that he did not allow dogs, "even if service dogs." Smith replied by providing information about Parsnip and clarified that the dog was "a verified emotional support animal covered by the ADA as a reasonable accommodation."

Brennan replied that a dog of Parsnip's weight would not be acceptable, sent a second email stating that he thought Parsnip would be a problem for many other landlords, and refunded Smith and Grant's application fee. Smith responded that she did not expect there to be issues with other landlords as Parsnip was an "emotional support animal."

Smith alleges that Brennan violated the Fair Housing Act ("FHA") and California's Fair Employment and Housing Act ("FEHA") by (1) failing to reasonably accommodate her disability and (2) by making a statement that indicated an impermissible preference or limitation based on disability. She also alleged that Brennan was negligent for participating in unlawful housing discrimination.

In its order granting partial summary judgment as to Smith's reasonable accommodation claim, the district court found that no reasonable jury could find that Brennan should have known of Smith's disability. Then in a bench trial on the briefs, the district court also held that Brennan did not violate the FHA or FEHA, as an ordinary reader would not conclude that Brennan's statements suggested an impressible preference or limitation based on disability.

Smith filed this timely appeal challenging both the district court's order granting summary judgment and its judgment in favor of Brennan.

I recommend that this Court ***REVERSE and REMAND*** *the district court's grant of summary judgment as to Smith's reasonable accommodation claim, and the district court's finding in favor of Brennan on the impermissible preference or limitation and negligence claims.*

QUESTIONS PRESENTED AND SHORT ANSWERS

1. **Did the district court err in granting summary judgment as to Smith's reasonable accommodation claim on the ground that there was no triable issue of fact as to whether Brennan reasonably should have known of Smith's disability?**

Yes. The district court erred in granting summary judgment as to Smith's reasonable accommodation claim because there is a triable issue as to whether Brennan reasonably should have known of Smith's disability. The Ninth Circuit has yet to publish an opinion directly addressing this issue, but this Court should follow its holding in its memorandum disposition in *Oregon Bureau of Labor and Industries ex rel. Fair Housing Council of Oregon v. Chandler Apartments, LLC*, 702 Fed. Appx. at *547 (9th Cir. July 26, 2017). In *Oregon Bureau*, this Court held that under the FHA, knowledge of a housing applicant's disability status can be actual or constructive and a "prospective tenant who requests accommodation for a service animal *need not affirmatively identify his or her disability* to trigger FHA protection." *Id.* (emphasis added). Grant's use of the phrase "reasonable accommodation" in her request and her references to Parsnip being a "registered support animal" present—at minimum—a genuine issue of material fact as to whether Brennan reasonably should have known of Smith's disability, especially when viewed in the light most favorable to Smith. **Excerpt of Record (ER) 6-7**.

2. **Did the district court err in entering judgment after a bench trial on Smith's claim that Brennan made a statement with respect to the rental of a dwelling that indicated an impermissible preference or limitation based on disability?**

Likely Yes. The district court likely erred in its holding that Brennan's statement did not indicate an impermissible preference or limitation based on disability when he wrote, "[m]y policy has been not to accept dogs, even if service dogs." **ER 3, 53-54**. This Court has yet to address the issue, but opinions of other circuits and decisions of district courts within this Circuit provide persuasive guidance. The consensus among these courts is to use the "ordinary reader" standard which dictates that a "statement violates 42 U.S.C. § 3604(c) if the statement, when heard by an ordinary reader, would conclude that the rule suggests a preference." *Iniestra v. Cliff Warren Invs., Inc.*, 886 F. Supp. 2d 1161, 1169 (C.D. Cal. July 31, 2012) (citation omitted); *see also Johnson v. Birks Props., LLC*, No. 21-CV-01380-GPC-DEB, 2022 WL 104736, at *2 (S.D. Cal. Jan. 11, 2022) (adopting the ordinary reader standard).

In reviewing Brennan's statement, the district court concluded that his preference for renters without dogs, including service dogs, did not mean a preference for renters without a disability, because the connection was "too tenuous." **ER 4**. But a consensus of persuasive case law suggests that an ordinary reader would assume that because support dogs are used *only* by people with disabilities, placing a limitation on support dogs inherently places a limitation on *all* people with disabilities who have support dogs. *See, e.g., Johnson*, No. 21-CV-01380-GPC-DEB, 2022 WL 104736, at *2; *Avakina v. Chandler Apartments, LLC*, No. 6:13-cv-1776-MC, 2015 WL 413813, at * 5 (D. Or. Jan. 30, 2015), *sub nom Or. Bureau of Lab. and Indus. ex rel. Fair Hous. Council of Or. v. Chandler Apartments, LLC*, 702 Fed. Appx. at *547 (9th Cir. July 26, 2017). Brennan's admitted understanding of the Americans with Disabilities Act ("ADA") and the role of service dogs could also prove an intent to discriminate that would violate Section 3604(c). **ER 18, 25**. Though this is a close issue which lacks direct instruction from binding case law, the implication of finding that Brennan's statement did not indicate an impermissible preference or

limitation would be contrary to express provisions of the FHA which require landlords to make reasonable accommodations for support animals. Allowing such statements in this context could sanction landlords to discriminate against protected classes in housing and rentals and further limit housing options for people with disabilities.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Abigail Smith lives with multiple physical and mental impairments including major depressive disorder, post-traumatic stress disorder, and fibromyalgia. **Excerpt of Record** (**ER) 2, 6**. Since 2016, at the recommendation of her physician, Smith has lived with an emotional support dog named Parsnip, a twelve-year-old Labrador mix, who helps alleviate Smith's symptoms. **ER 67**.

In April 2020, Smith and her friends Sasha Grant and Brian Llyod began searching for a home to rent in Capitola, California. **ER 70**. Smith and Grant found an advertisement for an available property and Grant contacted the owner, Paul Brennan, who invited them to apply and emailed Grant an application form. ***Id.*** The rental advertisement stated, "no dogs," but Grant and Smith submitted an application through email on May 25 with the thirty-dollar fee and disclosed that their household would include "1 registered support animal (12-year-old Labrador mix)" in addition to the three adults. **ER 6, 58**.

Brennan responded to the application via email and requested additional information about Grant's financial situation and Parsnip. **ER 7, 52-53** Brennan's email stated: "I received the documents you sent, and there are a few questions, issues. First is the dog. My policy has been not to accept dogs, even if service dogs. What is the weight of the dog?" ***Id.***

Grant answered in an email on May 27: "Parsnip is an elderly 50-lb Labrador mix. She does not bark and has no destructive tendencies or behaviors. She's a verified emotional support animal covered by the ADA[1] as a reasonable accommodation. I'd be happy to provide references,

[1] Grant incorrectly cited the ADA as requiring landlords to provide reasonable accommodations. In the housing context, it is the Fair Housing Act that imposes such a duty. This error is not fatal to Smith's claims because the FHA has a broader definition of "support animal" than the ADA, and unlike the ADA, the FHA includes protections for emotional support animals as well as specially trained service animals.

as well as an additional deposit and/or additional pet rent for her. Please do let me know if I missed anything or if there's more I can provide!" **ER 7, 53**.

Later that day, Brennan replied: "I can review your financial documents, but a 50 pound dog will not be acceptable....it does say that in the ad. I can keep your application on file, and will be refunding your appl. fee when I make a final decision." **ER 7, 54**. He sent a second email within the hour stating: "I think your dog will be a problem with a lot of landlords. I am sure you are attached to her, but at 12 years her life expectancy is limited. Older animals also tend to have problems like urinary incontinence. Is there someone who can take her for you?" ***Id.***

Grant responded: "Thanks for the follow-up! I understand your position. While I appreciate your concern about other landlords, I don't anticipate the dog being an issue elsewhere since she is, as I mentioned, an emotional support animal. Support and service animals are covered by federal ADA laws protecting reasonable accommodation requirements; it is illegal to discriminate against a prospective tenant based on their need for a support or service animal, a law that I anticipate most other landlords will respect. I wish you the best of luck with whatever tenant you do select." **ER 7, 55**.

Later that afternoon, Brennan rejected Smith and Grant's application and refunded the fee. **ER 7, 63-64**. Smith filed this lawsuit in July and one week later, Brennan emailed Grant a link to a webpage on service animals and the Americans with Disabilities Act ("ADA") (https://www.ada.gov/service_animals_2010.htm). **ER 6-7, 57**.

In preparation for trial, Brennan was deposed in May 2021 and stated that he was a practicing physician and has owned multiple rental properties for about "thirty-five years." **ER 16**. When asked about his understanding of the term "service animal" and "emotional support

animal," Brennan replied: "Well, my understanding, you know, I'm not familiar with the nuances of the law, is that under certain circumstances that a person is permitted to have an animal with them." **ER 17**. He clarified that his understanding of a service dog[2] was "basically like a blind dog that, you know, a blind person might have to assist them," but that he did not have a "specific understanding of that terminology" when Grant wrote that Parsnip was a "verified emotional support animal covered by the ADA as a reasonable accommodation." **ER 25**. He also stated that he did not recall reading or sending the ADA link on service animals that was emailed to Grant from Brennan's account. **ER 30**.

II. Legal Background

A. Fair Housing Act

Titles VIII and IX of the Civil Rights Act of 1968, more commonly known as the Fair Housing Act ("FHA") and subsequent Fair Housing Act Amendments, make it unlawful "to discriminate in the sale or rental … of a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). Discrimination under this section includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B).

While a reasonable accommodation inquiry is "highly fact specific, requiring case-by-case determination," *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997) (citation omitted), a plaintiff must prove the following elements: (1) that the plaintiff or their associate has a disability within the meaning of 42 U.S.C. § 3602(h); (2) that the

[2] Brennan was asked about his understanding of this specific term because he used the phrase "service dog" in his email to Grant, however, Grant only used the terms "support animal" and "verified emotional support animal" in her emails.

defendant knew or should reasonably be expected to have known of the disability; (3) that accommodation may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; (4) that the requested accommodation is reasonable; and (5) that defendant refused to make the requested accommodation, *Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *see also Giebler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003).

Under the FHA, it is also unlawful to: "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on … handicap … or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c).

B. California Fair Employment and Housing Act

California also prohibits housing discrimination based on disability in the California Fair Employment and Housing Act ("FEHA"). Section 12955(c) makes it a violation of the FEHA to: **"**make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on … disability or an intention to make that preference, limitation, or discrimination." *Cal. Gov. Code* § 12955 (c).

The FEHA provides "equivalent, if not greater protections" for victims of housing discrimination than the FHA. *Pack v. Fort Washington II*, 689 F. Supp. 2d 1237, 1247 (E.D. Cal. 2009); *see Cal. Gov. Code § 12955.6* ("This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.").

C. Americans with Disabilities Act

The ADA prohibits "discrimination against individuals with disabilities," imposes accessibility requirements in public accommodations, and requires employers to provide "reasonable accommodations" for employees with disabilities. 42 U.S.C. § 12101 et seq.[3]

III. Procedural History

Smith filed a lawsuit against Brennan—both as an individual and as trustee of the Brennan Trust—in the United States District Court for the Central District of California in August 2020. **ER 6**. She alleged that Brennan discriminated against her because of her disability in violation of the FHA and FEHA and that Brennan was negligent for participating in unlawful housing discrimination. **ER 8**.

A. The District Court Granted in Part and Denied in Part Bresler's Motion for Summary Judgment

The district court granted in part and denied in part Bresler's motion for summary judgment, finding that "[Smith's] evidence—the rental application and the email correspondence between [Brennan] and Grant—would not lead a reasonable jury to find that [Brennan] should have known of [Smith's] handicap." **ER 9, 11**. In its determination, the district court concluded that a reader could only be left with "[a]ssumption and speculation" as to Smith's disability status and granted summary judgment on the claim that Brennan failed to reasonably accommodate Smith's disability. **ER 9**. The district court denied Brennan's motions for

[3] In her emails, Gailey described Tinkerbell as "a verified emotional support animal covered by the ADA as a reasonable accommodation." **ER 7, 53**. She should have instead cited to the FHA as requiring reasonable accommodations because the FHA has a broader definition of "assistance animal" than the ADA which includes emotional support dogs and animals not trained to the level of ADA certification as a service animal. U.S. Dep't of Hous. and Urb. Dev, FHEO Notice: FHEO-2020-01 at 5 (defining assistance animals covered by the FHA as "(1) service animals, and (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities.").

summary judgment as to the impermissible preference and negligence claims reasoning that there remained a "genuine dispute." **ER 10-11**.

B. Judgment in Favor of Brennan After a Bench Trial on the Briefs

In a bench trial on the briefs, the district court found that Brennan did not make a statement that indicated an impermissible preference or limitation based on disability in violation of the FHA (42 U.S.C. § 3604(c)) or FEHA (Cal. Gov. Code § 12955(c)) because an "ordinary reader would not readily assume that by preferring a renter without a dog, [Brennan] also implicitly suggest[ed] that he prefers a renter without a handicap." **ER 4**. The district court also found that Brennan's follow-up question regarding the dog's weight would indicate to an ordinary reader that he would rent to someone with a dog and that assuming otherwise would be "too tenuous." ***Id.*** The district court also held that because Smith failed to prove her FHA and FEHA claims, she could not prove negligence. ***Id.*** Smith timely filed an appeal of the district court's judgments.

STANDARD OF REVIEW

"We review de novo the district court's grant of summary judgment." *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2014). Viewing the evidence in the light most favorable to the non-moving party, the court then determines whether there are any genuine issues of material fact and whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Demarest v. City of Vallejo, Cal.*, 44 F.4th 1209, 1213 (9th Cir. 2022) (holding that when an "appeal challenges an order granting summary judgment to the defendants, we must credit [plaintiff's] evidence as true and draw all reasonable inferences in [plaintiff's] favor.").

After a bench trial, findings of fact are reviewed for *clear error*, and conclusions of law are reviewed *de novo*. *Oswalt*, 642 F.3d at 859-60. "[M]ixed questions of law and fact" are also

"review[ed] *de novo*." *C. L. v. Del Amo Hosp., Inc.*, 992 F.3d 901, 909 (9th Cir. 2021). Mixed questions of law and fact exist "when there is no dispute as to the facts, the rule of law is undisputed, and the question is whether the facts satisfy the legal rule." *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (2000); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

DISCUSSION

Smith argues that the district court erred in holding that under the relevant FHA sections no reasonable jury could conclude that Brennan knew or reasonably should have known of her disability status, **Bl. Br 15**, and that Brennan's policy "not to accept dogs, even if service dogs" did not indicate a preference or limitation against people with a disability, **Bl. Br. 27**.

A review of the relevant—though largely nonbinding—case law suggests that Brennan had at minimum, constructive knowledge of Smith's disability status, and that his statement not to accept dogs likely violated the FHA given the context and his intent. Therefore, I recommend that this Court **REVERSE and REMAND** both the district court's grant of summary judgment as to Smith's reasonable accommodation claim and the district court's judgment in favor of Brennan on the impermissible preference or limitation claim.

I. This Court Has Jurisdiction to Review the District Court's Grant of Brennan's Motion for Summary Judgment and Judgment in Favor of Brennan

The district court had jurisdiction over Smith's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over Smith's state law claim pursuant to 28 U.S.C. § 1367. This Court has jurisdiction over appeals from all final decisions of the district court under 28 U.S.C. § 1291.

II. There is a Triable Question of Fact as to Whether Brennan Reasonably Should Have Known of Smith's Disability

Under the FHA, it is unlawful "to discriminate in the sale or rental … of a dwelling to any buyer or renter because of a handicap." 42 § U.S.C. 3604(f)(1). Discrimination under this section includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B). While a reasonable accommodation inquiry is "highly fact specific, requiring case-by-case determination," *Cal. Mobile Home Park*, 107 F.3d at 1380 (citations omitted), a plaintiff must prove the following elements: (1) that the plaintiff or their associate has a disability within the meaning of 42 U.S.C. § 3602(h); (2) **that the defendant knew or should reasonably be expected to have known of the disability**; (3) that accommodation may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; (4) that the requested accommodation is reasonable; and (5) that defendant refused to make the requested accommodation. *Dubois*, 453 F.3d at 1179 (emphasis added); *see also Giebler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003).

Brennan challenged only the second element, so the sole question before the district court, and now before this Court, is whether there is a material question of fact as to whether Brennan had or should have had knowledge of Smith's disability. **ER 9**.

Smith argues that Brennan's years of rental experience, the rental application, and email exchanges between Grant and Brennan would lead a reasonable jury to conclude that Brennan knew or at least reasonably should have known of Smith's disability status. **Bl. Br 15**. She argues that the district court misinterpreted the statute as requiring actual knowledge of an applicant's disability rather than constructive knowledge, and that references to Parsnip being a "registered support animal" and "verified emotional support animal" were enough for a

reasonable jury to find that Brennan should have known of Smith's disability. **Bl. Br 17-18**. Smith also points to Brennan's use of the phrase "service dog" in his emails; his admitted awareness of the ADA in his deposition; and Grant's mentions in her emails of the "ADA," "reasonable accommodations," and "discrimination," as further evidence that there is at least a triable issue as to Brennan's knowledge of Smith's disability status. **Bl. Br. 17**.

Smith additionally argues that the district court failed to consider that Brennan did not engage in an "interactive process" with Grant or inquire into Grant or Smith's disability statuses or need for a support dog. **Bl. Br. 12.** She argus that Brennan's failure to engage in this process is contrary to guidance from the Department of Justice and the Department of Housing and Urban Development, and that the district court should have considered this when analyzing Smith's reasonable accommodation claim. **Bl. Br. 12-13.**

Brennan contends that he did not know and should not have reasonably been expected to know that Smith had a disability because he was never explicitly informed by Smith or Grant that Smith had a disability. **Red Br. 10**. He maintains that he never spoke or communicated with Smith, that he was never informed that Smith herself had a disability, and that he was not told that the support dog would be for Smith or either of the other two rental applicants. **Red Br. 12**. He argues that the information he was given from Grant's emails "merely supports an assumption that a person who intends to reside in the home with the dog suffers a handicap," but does not lead to a conclusion that Smith herself had a disability or that her disability was such that required a reasonable accommodation for a support dog. **Red Br. 13**.

As a threshold matter, Brennan's argument implies that Smith lacks standing to bring this claim because he never directly communicated with Smith. Nonetheless, Smith has standing to bring these claims as the FHA permits any "aggrieved person" to bring a housing discrimination

suit, 42 U.S.C. § 3613(a), defining an "aggrieved person" as anyone who "claims to have been injured by a discriminatory housing practice" or "believes that such person will be injured by a discriminatory housing practice that is about to occur." *Id.* § 3602(i). The Supreme Court has repeatedly held that the FHA's definition reflects a "congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). Under the FHA, a plaintiff "need not allege that he or she was a victim of discrimination," but only that they suffered "a distinct and palpable injury" from the discriminatory conduct. *Harris v. Itzhaki*, 183 F.3d 1043, 1049-50 (9th Cir. 1999). Here, Smith suffered such an injury when Brennan denied her and Grant's housing application because of Smith's support animal. Furthermore, the first element of a claim for a refusal to make a reasonable accommodation requires that "the plaintiff **or his associate** is handicapped within the meaning of 42 U.S.C. § 3602(h)." *Dubois*, 453 F.3d at 1179 (emphasis added). Here, Smith could also be considered Grant's "associate" under § 3602(h). For these reasons, Smith has standing to bring these claims.

Additionally, Smith is correct in maintaining that the district court erred in its application of the "knew or should have known" standard under the FHA. Though it is clear that Brennan did not have actual knowledge of Smith's disability status, there is at minimum a material question of fact as to whether he had constructive knowledge of her disability. While there is a lack of Ninth Circuit published case law in this area, an unpublished memorandum disposition from this Court and opinions from other circuits are particularly helpful in coming to this

conclusion. Additionally, guidance from the U.S. Department of Housing and Urban Development ("HUD") is instructive.[4]

This Court has held, in an unpublished memorandum disposition, that under the FHA, knowledge of a housing applicant's disability status can be actual or constructive and a "prospective tenant who requests accommodation[s] for a service animal need **not** affirmatively identify his or her disability to trigger FHA protection." *Or. Bureau*, 702 Fed. Appx. at *547 (emphasis added); *see also* Joint Statement of the Dep't of Hous. and Urb. Dev. and the Dep't of Just., Reasonable Accommodations under the Fair Housing Act at 10 (May 17, 2004). HUD guidelines state that "it is not necessary to submit a written request or to use the words 'reasonable accommodation,' 'assistance animal,' or any other special words to request a reasonable accommodation under the FHA," and that accommodation requests can be made by others on behalf of the disabled individual. U.S. Dep't of Hous. and Urb. Dev, FHEO Notice: FHEO-2020-01 at 7-8. Here, although Smith never affirmatively identified her disability, Grant's use of the terms "registered support animal," "reasonable accommodations" and "discrimination," and Brennan's use of the phrase "service dog" and the link to the ADA website in his emails raise a triable issue as to whether Brennan reasonably should have known of Smith's disability status.

Furthermore, the "burden to inquire further [regarding a reasonable accommodation request] is on the landlord, not the prospective tenant."[5] *Avakina v. Chandler Apartments, LLC*, No. 6:13-cv-1776-MC, 2015 WL 413813, at * 5 (D. Or. Jan. 30, 2015), *sub nom Or. Bureau of*

[4] Of note, HUD's guidance is entitled to deference. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984); *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (holding that HUD is the "federal agency primarily charged with the implementation and administration" of the FHA, and that courts "ordinarily defer to an administering agency's reasonable interpretation of a statute").

[5] This "inquiry burden" is identical to the "interactive process" that Smith describes in her brief.

Lab. and Indus. ex rel. Fair Hous. Council of Or. v. Chandler Apartments, LLC, 702 Fed. Appx. at *547 (9th Cir. July 26, 2017). Other circuits have held that it is "'incumbent upon' a skeptical defendant 'to request documentation or open a dialogue' rather than immediately refusing a requested accommodation.'" *Bhogaita v. Altamonte Heights Condominium Ass'n.*, 765 F.3d 1277, 1287 (11th Cir. 2014) (quoting *Jankowski Lee & Assocs. v. Cisneros,* 91 F.3d 891, 895 (7th Cir. 1996)); *see also* U.S. Dep't of Hous. and Urb. Dev., FHEO Notice: FHEO-2020-01 at 8-10. Here, Brennan failed to engage in this inquiry when he denied Grant's housing application without any further questioning or inquiry because the application disclosed that the household would include a "registered support animal."

Though not binding precedent on the Ninth Circuit, this Court's unpublished disposition in *Oregon Bureau* is factually similar to the issues here and persuasive in its analysis. In this case, the manager of an apartment complex violated the FHA by refusing to grant reasonable disability accommodations to "tester"[6] rental applicants with service animals. *Or. Bureau*, 702 Fed. Appx. at *547. The building managers argued that there was "no reason to know" that the testers were disabled, but the court found that they reasonably should have known that the testers were requesting disability accommodations. *Id.* Statements from the testers such as, "[j]ust so you know, I have a therapy animal," or "I have an assistance dog," in addition to the manager's acknowledgement that he understood that the requests related to service animals and not pets, showed that the building managers reasonably should have known of the testers' disability statuses. *Id.* When granting summary judgment to the rental applicants, the district court held, and the Ninth Circuit affirmed, that "[t]he testers' statements certainly put [the manager] on

[6] FHA "testers" contact apartment complexes to inquire about vacancies despite having no interest in renting an apartment. Instead, they attempt to determine if the landlord is violating the FHA. "The valid use of testers in FHA cases is settled law." *Avakina*, No. 6:13-cv-1776-MC, 2015 WL 413813, at * 3.

notice that the testers were requesting reasonable accommodations for their assistance animals." *Avakina*, No. 6:13-cv-1776-MC, 2015 WL 413813, at * 5.[7]

Here, the district court erred by not citing to nor relying on *Oregon Bureau* in its grant of Brennan's motion for summary judgment. Many of the statements made by the testers in *Oregon Bureau* such as "I have a therapy animal" or "I have an assistance dog" are nearly identical to the statements in Grant and Smith's housing application and emails. *See, e.g.*, **ER 7, 55** (Grant's email stating "[The dog] is, as I mentioned, an emotional support animal.").

Additionally, many district courts in this Circuit have also found that a defendant reasonably should have known of a plaintiff's disability in similar circumstances. For instance, the district court's analysis in *Book v. Hunter*, No. 1:12-cv-00404-CL, 2013 WL 1193865, at *4 (D. Or. Mar. 21, 2013), is instructive. In *Book*, a landlord violated Section 3604(f)(3)(B) of the FHA by refusing to make a reasonable accommodation to her complex's "no pets policy" for a disabled applicant when the applicant submitted a doctor's note attesting to her need for a "companion animal to assist her." *Id.* at *1, *5. The court reasoned that the applicant had sufficiently informed the landlord of her disability and her request for an accommodation "such that defendants were aware or should have been aware of her handicap and her request." *Id.* at *4. Similarly, in *Smith v. Powdrill*, No. CV 12-06388, 2013 WL 5786586, at * 6 (C.D. Cal. Oct. 28, 2013), a landlord violated the FHA by failing to make a reasonable accommodation for an existing tenant when the tenant informed the landlord that she had "a companion animal necessary to address her disabilities." *Id.* at *1-2. The district court concluded that the "undisputed facts show that defendants knew, or should have known, of Plaintiff's disability"

[7] The district court case name is *Avakina v. Chandler Apartments, LLC*, No. 6:13-cv-1776-MC, 2015 WL 413813 (D. Or. Jan. 30, 2015), while the Ninth Circuit case name is *Oregon Bureau of Labor and Industries ex rel. Fair Housing Council of Oregon v. Chandler Apartments, LLC*, 702 Fed. Appx. (9th Cir. July 26, 2017).

considering that the landlord was informed that the tenant was attending "mental therapy" and that the dog provided "emotional support" according to the tenant's doctor. *Id.* at *5.

This Court's disposition in *Oregon Bureau* coupled with the above consensus of persuasive authority establishes that Brennan reasonably should have known of Smith's disability status. Furthermore, in this fact-intensive inquiry,[8] Grant's repeated use of phrases such as "registered support animal," "verified emotional support animal," and "reasonable accommodation" presents, at minimum, a genuine dispute as to Brennan's knowledge of Smith's disability. **Bl. Br 17-18**. The standards expressed by HUD, other circuits, an unpublished disposition from this Court, and persuasive district court cases from this Circuit all indicate that Smith made a reasonable accommodation request, and that Brennan was at least constructively put "on notice" of her disability status. Significantly, Brennan attested to his familiarity with the ADA and his understanding of "service dogs" in his deposition. His use of the phrase "service dogs" in his response email to Grant further demonstrates that he was aware that she was making an accommodation request for her household based on a disability, and not requesting that she be allowed a pet.

In his answering brief, Brennan adopts the reasoning of the district court and relies almost exclusively on the argument that the emails "merely support an assumption that a person who intends to reside in the home with the dog suffers a handicap," **Red Br. 13**, but that Brennan would not have known specifically of Smith's disability. As explained above, this argument is flawed because it legally does not matter whether the support dog was Smith's or Grant's or which of them were disabled because the FHA prohibits associational discrimination. Therefore,

[8] Because reasonable accommodation claims are fact-intensive inquiries, Smith makes a strong argument in her Reply Brief that this issue should not have been decided on summary judgment at all and should have instead gone to a jury. **Gr. Br. 8**.

Smith, or Grant as her representative, did not need to affirmatively state that Smith was disabled and the tenant who needed the support dog.

Though not determinative, the district court also did not consider the fact that Brennan failed to engage in an interactive process with Grant to determine if one of the applicants was disabled and if the request was reasonable as suggested by HUD guidelines, to which this Court gives deference. Grant offered to submit references for Parsnip and provide any additional information, but Brennan rejected the application without any follow-up questions besides asking the dog's weight.[9] Based on the email exchange and Brennan's acknowledgement that the accommodation request was for a "service dog," a reasonable jury could find that Brennan knew or should have reasonably known of Smith's disability status. The district court erred in granting summary judgment on this issue and should be reversed and remanded.

III. Brennan's Statement Likely Indicated an Impermissible Preference or Limitation Based on Disability

Additionally, Smith argues that the district court erred in granting judgment in favor of Brennan on the question of whether his statement "not to accept dogs, even if service dogs" is an impermissible preference or limitation based on disability in violation of the FHA.

A. This Court Should Apply the *De Novo* Standard of Review to the District Court's Judgment on Smith's Impermissibly Preference of Limitation Claim

The parties disagree as to the appropriate standard of review to apply in evaluating this claim. Brennan argues that the district court's conclusions were findings of fact and should therefore be reviewed for *clear error*. **Red Br. 15**. Although it is unclear which standard Smith

[9] Brennan's inquiry into the weight of the dog does not satisfy the requirement to engage in an interactive process because "housing providers may not limit the breed or size of a dog used as a service or support animal." U.S. Dep't of Hous. and Urb. Dev, FHEO Notice: FHEO-2020-01 at 14.

is asking this Court to apply, she seems to argue that this Court should review the district court's conclusions *de novo* as they were conclusions of law. **Bl. Br. 10**.

Under Ninth Circuit precedent, this Court should review the district court's bench trial judgment *de novo* because the specific conclusion under review—regarding the impermissible preference or limitation, and negligence claims—is a mixed question of fact and law. The *de novo* standard is appropriate here because the parties do not dispute the facts or the rule of law to be applied and the question under review is solely whether the facts satisfy the legal rule. *Lim*, 217 F.3d at 1054 (defining mixed questions as "when there is no dispute as to the facts, the rule of law is undisputed, and the question is whether the facts satisfy the legal rule."); *see also Del Amo Hosp., Inc.*, 992 F.3d at 909.

B. This Court Should Adopt the Ordinary Reader Standard in Analyzing Section 3604(c) Claims

Under Section 3604(c) of the Fair Housing Act, it is unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any *preference, limitation*, or discrimination based on … handicap … or an intention to make any such preference, limitation, or discrimination. 42 § U.S.C. 3604(c) (emphasis added).

The Ninth Circuit has yet to adopt a framework for addressing Section 3604(c) claims, but other circuits, and district courts within the Ninth Circuit use an "ordinary reader" standard. Therefore, I think that is the appropriate standard for this Court to apply.

Significantly, other circuits and district courts in this Circuit have found, and both parties agree, that Section 3604(c) claims do not require a showing of discriminatory intent. *Iniestra*, 886 F. Supp. 2d at 1169 (citing *Jancik v. Dep't of Hous. and Urb. Dev.*, 44 F.3d 553, 556 (7th Cir. 1995)); *see also Pack*, 689 F. Supp. 2d at 1245. A statement is shown to violate Section 3604(c) in one of two ways: (1) the statement is discriminatory on its face, meaning that "the

defendant made the statement with the actual intent to discriminate," or (2) an "ordinary listener" would "naturally interpret the statement as indicating a preference for or against a protected group or as indicating some other limitation or discrimination against a protected group." *Fair Hous. Res. Center, Inc. v. DJM's 4 Reasons LTD.*, 499 Fed. Appx. 414, 415 (6th Cir. 2012). An "ordinary reader" standard applies when statements or postings are not facially discriminatory to determine if the publication presents an "impermissible preference" or limitation. *See Iniestra*, 886 F. Supp. 2d at 1169.

To prove a Section 3604(c) violation based on an alleged statement that is not facially discriminatory, a plaintiff must present evidence that (1) the defendant made the statement, (2) the statement was made with respect to the rental of a dwelling, and (3) the statement indicated a preference, limitation, or discrimination on a prohibited basis. *White v. Dep't of Hous. and Urb. Dev.*, 475 F.3d 898, 904 (7th Cir. 2007). The defendant's statement need not indicate a complete ban, and even a suggestion that a "particular [protected group] is preferred or dispreferred for the housing in question" violates this section of the FHA. *Jancik*, 44 F.3d at 556 (quoting *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991)). Furthermore, referential statements or advertisements are not required to "jump out at the reader with their offending message," because the statute is violated by "any ad that would discourage an ordinary reader of a particular [protected group] from answering it."[10] *Id.* at 556 (quoting *Ragin*, 923 F.2d at 999-1000).

The ordinary reader inquiry instead focuses on "whether the alleged statement at issue would suggest a preference to an 'ordinary reader or listener.'" *Pack*, 689 F. Supp. 2d at 1245; *see also Iniestra*, 886 F. Supp. 2d at 1169 (citing *U.S. v. Hunter*, 459 F.2d 205, 215 (4th Cir.

[10] *Jancik* specifically discussed rental advertisements that violate the FHA, but the same logic applies to written statements in connection with renting, as the language of the FHA does not make a distinction between "any notice, statement, or advertisement" that is made, printed, or published. 42 U.S.C. § 3604(c).

1972)). The ordinary reader is not "the most suspicious nor the most insensitive of our citizenry," and context and intent should play a role in the analysis when a statement is not "facially discriminatory," but still indicates an impermissible limitation or preference. *Soules v. Dep't of Hous. and Urb. Dev.*, 967 F.2d 817, 824-25 (2d Cir. 1992) (citing *Ragin*, 923 F.2d at 999).

C. Brennan Likely Expressed an Impermissible Preference or Limitation in Violation of the Fair Housing Act

Smith argues that Brennan's policy "not to accept dogs, even if service dogs" indicates a preference or limitation against people with disabilities and is discriminatory on its face. **Bl. Br. 27**. She maintains that a "service dog" is a legal term of art that is "***exclusively and uniquely associated with individuals with disabilities***" and that Brennan's statement therefore necessarily reflects an impermissible preference and is facially discriminatory. ***Id.*** (emphasis in original). She goes on to argue that because the statement was facially discriminatory, the district court erred in considering Brennan's intent and the context in which the statement was made, but concludes that even if these factors were considered, Brennan's statement would be discriminatory. **Bl. Br. 30**.

In the alternative, Smith also argues that Brennan's statement is discriminatory under the ordinary reader standard. She cites Brennan's deposition in which he stated that his policy not to accept service dogs included guide dogs for blind people as evidence of his subject intent, **ER 26**, and that his follow-up question in the email regarding Tinkerbell's weight is irrelevant to "curing" Brennan's statement because housing providers cannot reject a reasonable accommodation request because of the breed or size of a service animal. **Bl. Br. 32-33**. She further argues that the statement was made in the process of reviewing a rental application and that Grant's emails with language like "reasonable accommodation" and "verified emotional

support animal" further proves that in this context, an ordinary reader would find Brennan's policy and statement discriminatory. **Bl. Br. 34-35**.

Brennan's argument, which the district court adopted, is that his statement indicated a preference for renters without dogs, but not necessarily for renters without disabilities. **Red Br. 17**. He argues that an ordinary reader would not "readily assume that by preferring a renter without a dog, [he] also implicitly suggested that he prefers a renter without a handicap." ***Id.*** Brennan points to the district court's conclusion that no reasonable jury could find that he should have known of Smith's disability as further proof that the context in which the statement was made does not suggest that the statement was discriminatory and that his follow-up questions regarding Parsnip's weight indicate that he "would consider renting to someone with a dog, including a service dog." **Red Br. 17-18**.

Because it is undisputed that Brennan wrote the email and that the expressed pet policy was in reference to the rental of a dwelling, the sole issue before this Court is whether Brennan's policy "not to accept dogs, even if service dogs" indicated a preference, limitation, or discrimination based on disability to an ordinary reader.

The Ninth Circuit has yet to address this question in this context and as such, this Court should rely on a consensus of persuasive case law in reaching its conclusion. In particular, I recommend that the Court follow the reasoning in *Johnson v. Birks Properties, LLC*, No. 21-CV-01380-GPC-DEB, 2022 WL 104736, at *2 (S.D. Cal. Jan. 11, 2022).[11] In *Johnson*, a landlord decided not to renew the lease of a tenant after she informed the landlord that she would be living with an emotional support dog. *Id.* at *1. The landlord stated: "When your lease comes

[11] The district court's decision in *Johnson* addresses a motion for summary judgment, and the case ultimately settled out of court. It is, however, one of the most on-point cases in this Circuit addressing Section 3604(c) cases with support animals.

back around, I'm not going to want a dog on the property. I don't want animals on my property." *Id.* The court denied the landlord's motion for summary judgment under the ordinary reader standard because the statement "read in context, ignores Plaintiff's documented medical condition and need for an accommodation" and "plausibly express[es] a preference against or limitation on those residents who rely on ESAs (emotional support animals)." *Id.*

Additionally, *Avakina v. Chandler Apartments, LLC*, No. 6:13-cv-1776-MC, 2015 WL 413813, at * 5 (D. Or. Jan. 30, 2015), *sub nom Oregon Bureau of Labor and Industries ex rel. Fair Housing Council of Oregon v. Chandler Apartments, LLC*, 702 Fed. Appx. at *547 (9th Cir. July 26, 2017), is also persuasive in its analysis and conclusions on a Section 3604(c) claim.[12] I discussed the facts of *Avakina* when discussing the appellate decision in *Oregon Bureau* above. In *Avakina*, the district court found that a rental manager's statement that "the owner does not want any animals in the building, including service animals" in response to tester applicants stating that they had a "therapy animal" or "assistance dog" violated the FHA. No. 6:13-cv-1776-MC, 2015 WL 413813, at * 1-2, 5. Though the court blends its analysis of the manager's statement under Section 3604(c) and the reasonable accommodation claim, it concluded that the apartment manager's statement that pets were not permitted was discrimination based on disability because the applicants' preceding statements "put [defendant] on notice that the testers were requesting reasonable accommodations for their assistance animals." *Id.* at * 5. The *Avakina* court's determination that the statement was discriminatory suggests that it found the statement was also an impermissible preference under Section 3604(c) of the FHA. Another district court within this Circuit then used the reasoning in *Avakina* to determine that actions

[12] Though it is unclear whether the court in *Avakina*, No. 6:13-cv-1776-MC, 2015 WL 413813, applied an ordinary reader standard, its holding and reasoning support such an assumption, and it mirrors the court's reasoning in *Johnson*, No. 21-CV-01380-GPC-DEB, 2022 WL 104736, at *2.

prohibited under Section 3604(c) include "using words or phrases which convey that dwellings are not available to a particular group of persons because of a handicap and other expressions that 'indicate' a preference or a limitation on any renter because of handicap." *Elliott v. Versa CIC, L.P.*, No. 16-cv-0288-BAS-AGS, 2019 WL 414499, at *8.

I think this Court should follow the reasoning of the district courts within this Circuit to find that Brennan's statement that his "policy has been not to accept dogs, even if service dogs" violates Section 3604(c) of the FHA because the statement indicates a preference for renters without service dogs which in turn is a limitation on renters with disabilities. Significantly, service and support dogs are *exclusively* used by those with disabilities to "do work, perform tasks, assist, and/or provide therapeutic emotional support." FHEO Notice: FHEO-2020-01 at 3. As support animals and people with disabilities are intrinsically linked in this way, an ordinary reader would interpret Brennan's statement to be both a preference and limitation based on a protected group in violation of the FHA.

First, the district court likely erred in its conclusion of law that Brennan's statement was not discriminatory on its face. This conclusion warranted further analysis as the statement is arguably discriminatory on its face because it is directly counter to express provisions of the FHA which mandate that landlords make reasonable accommodations for tenants with disabilities who require the assistance of a support animal. Given Brennan's understanding of service animals and that he reasonably should have known of Smith's disability status, his statement can reasonably be understood to have been made with the "actual intent to discriminate." *Fair Hous. Res. Center, Inc.*, 499 Fed. Appx. at 415.

Second, if the statement is not discriminatory on its face, the district court still likely erred in its conclusion that Brennan's statement is not impermissible under an ordinary reader

standard because his statement reasonably indicates a preference for renters who do not require service or support dogs. The district court based its reasoning on the argument that although Brennan's "statement certainly indicates a preference for renters without dogs," his "statement does not necessarily indicate a preference for renters without a handicap." **ER 4**. By finding this assumption "too tenuous," the district court centers its conclusion on the fact that not all people with disabilities have support animals, and while this is true, this reasoning is flawed. Just as not all people with disabilities use wheelchairs or other mobility aids, a policy that would not allow a renter to use a wheelchair in an apartment would certainly indicate an impermissible preference or limitation based on disability in violation of Section 3604(c). In this situation, the connection between wheelchair use and disability is not "too tenuous" and neither is the connection between support animals and disabilities. Though not all people with disabilities use a support dog, Brennan's policy suggests a discriminatory preference and limitation that would make his rental housing unavailable to an entire group of people with disabilities. No person with disabilities who requires a support dog of any kind could be accommodated—including those who are blind, hearing impaired, or live with any other physical or mental disability.

The district court even acknowledged that "[a] landlord's policy not to accept renters with dogs, 'even service dogs,' could reasonably suggest that persons with service dogs need not apply, therefore limiting any disabled person who depends on a service dog from securing that rental." **ER 10**. But the district court then made the mistaken assumption that Brennan's inquiry into Parsnip's weight could indicate to the ordinary reader that there was as possibility that he "would rent to someone with a dog, including a service dog" depending on the dog's size. **ER 4**. However, to violate Section 3604(c), Brennan's statement only needed to suggest a preference or limitation rather than a complete ban. Therefore, the district court erred in holding that the

possibility of renting to a person with a service dog based on the dog's weight meant that Brennan's statement did not indicate a preference or limitation.

Additionally, the district court overlooked the context in which the statement was made which suggests that an ordinary reader would interpret Brennan as having indicated a preference or limitation based on disability. Grant's explanation that Parsnip is "a verified emotional support animal" and that she could "provide references" would suggest to an ordinary reader that, when read in context, Brennan's statement expresses a preference against or limitation on tenants who rely on support dogs. *See Johnson*, No. 21-CV-01380-GPC-DEB, 2022 WL 104736, at *2 (holding that a landlord's no pet policy when "read in context, ignore[d] Plaintiff's documented medical condition and need for an accommodation").

As there is no binding precedent on this issue, the Court has discretion in reaching its conclusion, and while this Court could find that the district court's holding that a preference for renters without dogs, service dogs included, is a preference based on a dislike for dogs and not people with disabilities, I think that conclusion overlooks the context and intent behind Brennan's statements, the reasoning of a consensus of persuasive case law, and the inherent and inextricable connection between support animals and people with disabilities. Furthermore, affirming the district court's holding that Brennan's policy was not in violation of Section 3604(c) would be contrary to other express provisions of the FHA and have serious and negative policy implications. As Smith argues in her reply brief, the FHA "cannot be interpreted and applied in a manner that creates a gaping loophole for housing providers inclined to discriminate." **Gr. Br. 14**. It would also be contrary to the broader purpose of the FHA to find this statement permissible, as the FHA Declaration of Policy states, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United

States." 42 U.S.C. § 3601. Limiting the available housing for a renter with a disability who relies on an assistance animal is contrary to such purpose.

Accordingly, based on the context and intent of the statement, I recommend that this Court reverse the district court's finding and hold that Brennan violated Section 3604(c) of the FHA by indicating an impermissible preference or limitation based on disability under the ordinary reader standard.

D. Brennan Also Likely Violated the California Employment and Housing Act Claim

California also prohibits housing discrimination based on disability in the California Fair Employment and Housing Act. *Cal. Gov. Code* § 12955 et seq. Compared to the FHA, the FEHA provides "equivalent, if not greater protections" for victims of housing discrimination. *Pack*, 689 F. Supp. 2d at 1247; *see Cal. Gov. Code § 12955.6* ("Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal *Fair Housing Amendments Act of 1988 (P.L. 100–430)* and its implementing regulations"). Because courts apply the same standards to FHA and FEHA claims," *Walker v. City of Lakewood*, 272 F.3d 1114, 1131 n. 8 (9th Cir. 2001), a reversal of the district court on the FHA claim would also be a reversal of the FEHA claim.

As discussed in the previous section, the district court likely erred in its judgment in favor of Brennan on Smith's FHA claim, and by extension the FEHA claim, and this Court should reverse.

E. Brennan Also Likely Breached a Duty of Care by Violating the FHA and FEHA

To prevail on a negligence claim in California, a plaintiff must show "a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." *Jones v. Awad*, 252 Cal. Rptr. 3d 596, 602 (Ct. App. 2019) (quoting *Beacon*

Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP, 173 Cal. Rptr. 3d 752, 755 (Ct. App. 2014) (citation omitted)). Though it has not been addressed directly by this Court, district courts within this Circuit have held that a landlord's failure to comply with the FHA, and by extension the FEHA, constitutes a breach of duty not to discriminate in the rental of a dwelling. *S. Cal. Hous. Rts. Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005). Here, because the district court likely erred in finding that Brennan's statement did not violate the FHA and FEHA, this Court should reverse on the negligence claim because Smith can show a breach of duty.

CONCLUSION

For the foregoing reasons, I recommend that we **REVERSE and REMAND** both the district court's grant of summary judgment of Smith's reasonable accommodation claim, and the district court's finding in favor of Brennan on the impermissible preference or limitation and negligence claims.

Applicant Details

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Last Name	**Griffiths**
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Contact Phone Number	**719-679-7084**

Applicant Education

BA/BS From	**Colorado College**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 25, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**N.Y.U. Review of Law & Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Death Penalty**

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a third-year student at the New York University School of Law. I am writing to apply for a 2024-2025 term clerkship in your chambers.

My work experience reflects my passion for the law, policy, and public service. I had a peripatetic childhood, moving between eight countries on four continents. When I moved to the U.S. for college, I pursued funded political science research in France and the American South, building on government internships in Mozambique, Germany, and Denver. Following graduation, I served as a bridge between the policy and legal departments at the ACLU of Colorado, where I wrote major legislation, led state-wide campaigns including the successful repeal of the death penalty, and supported winning lawsuits. At law school, I developed strong legal writing skills in my research assistant roles and as senior articles editor. During summer internships and a clinic, I wrote legal memos, drafted affidavits and briefs, and counseled clients for federal cases.

Most recently, while working on a lawsuit defending the rights of children held at psychiatric facilities and assessing the procedural hurdles that keep prisoners out of court, I have become invested in the everyday decisions that shape most people's experiences with the justice system. The cases on which I have worked, including a *Monell* claim challenging unconstitutional policing, a negligence claim against gun manufacturers following a mass shooting, and challenges to city ordinances criminalizing homelessness, capture my vision of channeling the law to craft a better world. Through this clerkship, I hope to understand what guides judicial decision-making, prepare for my career as an impact litigator, and apply my legal skills to champion everyday justice.

Enclosed please find my résumé, transcript, and writing sample. The writing sample is a memo prepared during the Civil Rights Clinic. Also enclosed are letters of recommendation from Professors Deborah Archer (212.998.6473), Barry Friedman (212.998.6293), and Rachel Barkow (212.992.8829). If you have any questions, please feel free to contact me at the above address and telephone number. Thank you for your consideration.

Respectfully,

Helen Griffiths
Helen Griffiths

HELEN GRIFFITHS

hbg8394@nyu.edu | 719-679-7084

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY — Sep 2021 – Present
Honors: - *Furman Public Policy Scholar*, full merit scholarship awarded to two students annually
- *Birnbaum Women's Leadership Fellow,* selective program awarded to 12 students
- *2023 Next Generation Leaders Program*, national American Constitution Society award
Activities: - *Senior Articles Editor*, N.Y.U. Journal of Law & Social Change; *President*, NYU Law American Constitution Society; *Co-Chair*, Law Women Advocacy Committee

COLORADO COLLEGE, Colorado Springs, CO — Aug 2014 – May 2018
BA in Political Science, Phi Beta Kappa
Honors: - *Distinction in the Major; Fred Sondermann Award* for excellence; *First Year Writer's Award*
Activities: - *Founder of Democratic Dialogue Project*, fosters discussions with Air Force Academy students

PROFESSIONAL EXPERIENCE

EVERYTOWN LAW, *Litigation Intern*, New York, NY — May 2023 – Present

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant to Professor Rachel Barkow & Professor Barry Friedman — May 2022 – Present
Researched comparative clemency for article; contributed to article on the federal government's role in policing
Policing Project Legal Intern — May 2022 – Sept 2020
Wrote memos assessing legal claims for litigation against police departments; analyzed national legislation

ACLU OF COLORADO, Denver, CO
Public Policy Strategist — Aug 2020 – Aug 2021
Coordinated Redemption Campaign to expand clemency, including authoring report, leading ad campaign with Denver Broncos, and preparing affidavits for two lawsuits; drafted three bills and testified on four bills
Public Policy Associate — Aug 2018 – Aug 2020
Led successful campaign to end the death penalty, including coordinating the coalition and bill rollout
Public Policy Fellow — Aug 2018 – Aug 2019
Wrote legal letters to sheriffs that prompted changes to municipal laws to decriminalize homelessness; testified on four bills; drafted two bills; produced legal memos; presented during statewide bail commission

COLORADO COLLEGE, Colorado Springs, CO
Political Science Department Research Assistant — May 2017 – Aug 2017 and May 2018 – Aug 2018
Drafted chapter for professor's book on political identification; developed a model of political ideology
Residential Adviser — Aug 2015 – May 2017
Organized events; counseled students; selected by Sustainability Office as one of two Eco-RAs
Political Science Department First Year Mentor — Jan 2017 – May 2017
Coordinated discussion groups; reviewed and edited class papers; wrote model essays; created study guides
Staff Writer for the Catalyst Newspaper — Oct 2014 – Oct 2015
Investigated and reported on campus events, one feature was referenced by *The Economist*

SENATOR MICHAEL BENNET, *Intern*, Denver, CO — Sept 2016 – Dec 2016
Advocated with state and municipal agencies on immigration issues; summarized bills on healthcare

CONGRESSWOMAN DIANA DEGETTE, *Intern*, Denver, CO — Sept 2016 – Dec 2016
Drafted remarks for Congresswoman; wrote policy briefs on healthcare; managed constituent casework

MARSHALL CENTER FOR EUROPEAN SECURITY STUDIES, *Research Assistant,* Germany — May 2016 – Aug 2016
Supported execution of graduate-level program in national security for 120 international participants

U.S. EMBASSY, Mozambique
Public Health Communications Intern / Public Affairs Intern — May 2014 – Aug and May 2015 – Aug 2015
Organized nationwide campaign to destigmatize HIV; researched strategies for youth adherence to antiretrovirals

Name: **Helen B Griffiths**
Print Date: **06/07/2023**
Student ID: **N11078124**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Anna N Roberts			
Torts	LAW-LW 11275	4.0	B
Instructor: Daniel Jacob Hemel			
Procedure	LAW-LW 11650	5.0	A
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	B+
Instructor: Samuel Issacharoff, Richard H Pildes			
Evidence	LAW-LW 11607	4.0	B
Instructor: Erin Murphy			
Property	LAW-LW 11783	4.0	B
Instructor: Cynthia L Estlund			
Religion and the First Amendment	LAW-LW 12135	2.0	IP
Instructor: Schneur Z Rothschild, John Sexton			
The First Amendment's Religion Clauses	LAW-LW 12841	1.0	IP
Instructor: Schneur Z Rothschild, John Sexton			

	AHRS	EHRS
Current	15.0	12.0
Cumulative	45.0	42.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	A
Instructor: Emma M Kaufman			
Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer, Joseph Schottenfeld			
Civil Rights Clinic	LAW-LW 10627	3.0	A
Instructor: Deborah Archer, Joseph Schottenfeld			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	55.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

NYU | LAW

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June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Helen Griffiths

Dear Judge Walker:

I am Associate Dean for Experiential Education and Clinical Programs and Professor of Clinical Law at NYU School of Law. I am also President of the ACLU. I am writing to enthusiastically recommend Helen Griffiths as a law clerk in your chambers. I have had the pleasure of getting to know Helen as one of ten students in my intensive Civil Rights Clinic and seminar. Helen stood out for her rigor, intellect, and tenacity. Her thoughtful participation in class reflected a deep engagement with the materials and a probing intellect exploring novel areas of the law. In group meetings, she displayed a remarkable capacity for introspection and a desire to tackle new challenges. Her inspiring work ethic, capacity to effectively manage multiple cases, and strong legal analysis would make her a brilliant clerk.

Throughout the clinic, she demonstrated superior legal research, writing, and investigative skills. During the investigation phase for a potential lawsuit, Helen deftly managed records requests and reviewed responsive documents. She quickly forged productive relationships with other attorneys and activists involved in the cases. In countless calls, emails, and texts, she built a network of attorneys, care providers, reporters, and families. She brings such empathy to her work that she managed to build meaningful relationships with clients who felt comfortable confiding in her during difficult conversations, including some who shared experiences of sexual and physical assault. In other settings, she has forged professional partnerships, including presenting claims to a law firm and meetings with potential co-counsel.

In a dozen legal memos, she displayed excellent legal research and writing skills. In a landscaping memo on a state's behavioral health care system, a memo assessing the variety of potential claims, and a summary of factual research, she succinctly captured the necessary information about a case. Her work reflects a thorough, focused approach to addressing all potential questions. For one memo, she reviewed all NYPD procedures, summarized law review articles, and conducted long-form interviews. Helen understands the importance of applying the law in changing contexts. In a memo concerning the history of removal of Native American children from their communities, she sought to ground her current work in the real-world consequences of prior decisions. Her strong writing is only matched by her commitment to applying her skills to improve the lives of others.

Helen demonstrated resilience in the face of challenges during the course. When faced with a broad issue to resolve, she channeled team efforts into a strategy that she spent the semester executing with skill. Though she had limited prior experience concerning substantive due process claims, she dove into the material. She read every case in the circuit to assess how the court applied the professional judgment standard. She analyzed the state's statutes for potential weaknesses. She indefatigably reviewed hundreds of trial court cases raising procedural due process claims. In a significant prelitigation memo, her cogent analysis covered a variety of thorny issues, such as finding state action when suing a private party and suing the state for the actions of third parties. She also authored a thorough memo analyzing Fourth Amendment law that included nuanced state-level inquiries into arrest standards. She identified several areas that were ripe for challenge and assessed the strengths and weaknesses of each. In other memos, she analyzed the procedural requirements, legal standards, and remedies for a variety of constitutional claims.

Helen also channels her passion and hard work outside of class. In her first year, she spoke to a 90-person law class, developed a biweekly reading group for 1Ls, and tutored formerly incarcerated students who are attending college. The next year, she launched fundraisers for nonprofits, led 45 NYU Law students on a voter protection trip to Pennsylvania, and organized three events with 215 attendees. Her advocacy and leadership have been recognized. She was selected as part of NYU Law's Women's Leadership Training Program and as a student speaker at the National Legal Aid & Defender Association's Annual Conference. Whether in class or in the broader world, she has applied her exceptional legal skills to advocate for a more just future.

I believe Helen would be a great addition to your team. If I can provide any further information, please don't hesitate to let me know.

Sincerely,

Deborah Archer - deborah.archer@nyu.edu - 212-998-6528

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Charles Seligson Professor of Law
Faculty Director, Zimroth Center on the Administration of Criminal Law

June 9, 2023

RE: Helen Griffiths, NYU Law '24

Dear Judge:

I am writing to recommend Helen Griffiths for a clerkship in your Chambers. Helen was my research assistant the summer after her 1L year, and her work was outstanding in all respects. She is a clear and effective writer, a thorough researcher with excellent judgment, and an all-around brilliant, analytical thinker who is a delight to work with.

Helen assisted me with a variety of research projects related to executive clemency. One of the reasons I hired her was her experience working on clemency issues in Colorado, and the combination of her real-world understanding and top-notch research and writing skills produced one first-class memo after the other.

She summarized various state clemency practices and approaches, described changes to clemency practice around the country in response to the COVID-19 pandemic, summarized law review articles on clemency, and surveyed different international approaches to clemency. Each memo was well written and rich with material for my project. Her judgment about what to include was impeccable, and I appreciated that she presented some of the information in chart form in addition to a traditional narrative format because it made it so easy to use and reference. One of the research assignments required her to explore justifications for clemency, and she did a terrific job exploring different historical and philosophical arguments that have been raised by politicians, judges, and academics. She knows how to take complicated material and translate it to its main points, and she has excellent judgment about what to focus on and what is tangential.

Helen is dedicated to working in the public interest and already amassed an impressive track record of public service before coming to law school. She worked for three years at the ACLU of Colorado and assisted with a wide range of projects,

performing legal research, drafting legislation, conducting client interviews, and engaging in public policy strategies. She managed three statewide campaigns, including one to expand clemency in Colorado. I was familiar with this campaign even before I met Helen and was so impressed to discover she was behind it. Helen is someone who gets things done with her intelligence, hard work, and commitment.

She has been just as active during her time at NYU. She organized two events in her role as 1L representative for the American Constitution Society (ACS). One addressed the role lawyers can play in ending mass incarceration and the other focused on women in law and government. Both events were well attended and highly praised for the quality of the discussion. Helen moderated the mass incarceration event and did a terrific job. She became the president of NYU's ACS chapter during her second year and has done a terrific job expanding mentoring opportunities for students and continuing to sponsor great events. In addition, she spearheaded a voter protection initiative in Pennsylvania and carved out time each week during her busy 1L year to tutor formerly incarcerated students.

Helen is committed to using her law degree to improve the lives of others. After she graduates, she hopes to work on impact litigation and eventually work as a policy or legal director advocating for civil liberties. Along the way, she would love to clerk for a federal district judge, and I have every confidence she will shine in that capacity. She has the skill set to thrive as a clerk. She is great at multi-tasking, getting through complicated material quickly, writing clearly, and researching anything you need. She is also a joy to be around, as she always has a positive attitude and is kind to everyone. I think you will love working with her.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Rachel Barkow

Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
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Dear Judge,

I am writing on behalf of Helen Griffiths, who is applying to clerk for you any time after graduating from law school in the Spring of 2024. Helen has been my student and my research assistant. She is really great, and I am happy to recommend her to you.

I met Helen in my 1L Reading Group on Big Brother Policing, which dealt with emerging technologies and their use in persistent surveillance. We wanted the students to understand how those technologies might be regulated under various legal regimes (Fourth Amendment, statutory, etc.), and what regulation might look like. Helen was a standout. She was completely prepared for all sessions, even though these Reading Groups are pass/fail, and she came with intelligent things to say. She was a spark.

Based on my exposure to her throughout the year, I asked Helen to do not one, but two, things with me the following summer. First, she was my Research Assistant. She worked closely with me on an article on The Federal Role in Local Policing. Her assignment was the Spending Clause, how it had been used to facilitate police reform, how and why it failed to accomplish this, and what might be done to improve. The result was a series of memoranda including one large one that I believe she is using as a writing sample. I also asked her to intern at the Policing Project, a center I run at the law school. She had intended to work full time, and RA part time, and so I snapped up all of her that I could.

I've continued to work with Helen since, and it will be pertinent to you to understand why I went all in on her for assistance. First, Helen has boundless energy. She's a tireless worker, either for causes she believes in, or to learn about law and where there is room for social change. Second, she's incredibly responsible. When she says she will do something, she does it, on time. Third, she's tenacious about legal research, and has unearthed a great deal of information for me in a short amount of time. She's smart, writes clearly, and is utterly reliable.

I want to flag Helen's grades in the Spring of 2023, because they are fantastic. They represent the Helen I know. Her grades were fine throughout, but I never felt they indicated how smart I always found Helen to be. I can see that the methodology of exam-taking finally has kicked in, and I am delighted. Trust me, Helen is very bright.

Helen plans to work on social change and impact litigation. What Helen she accomplished in numerous law school activities, in leadership roles, is nothing short of spectacular. She has worked on voter protection, set up reading groups on the Dobbs decision, organized major school events, and been a Senior Articles Editor for the Journal on Law and Social Change. She's going to be a major force for change in the world.

As a person, it is extremely easy to warm up to Helen. She has a big heart, and always wants to do the right thing. She is game for almost anything. She has lived all over the world, and is both down to earth and cosmopolitan. I like her very much.

Helen is going to be a great clerk for the right judge. She is going to work hard to make your life easier and your work product better.

I am happy to answer any questions.

Best regards,

Barry Friedman